(1) Supreme Court, U.S.
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1999

TIMOTHY P. FRYE, **Petitioner**,

v.

FREDERICO PENA, Secretary,
Department of Transportation
LINDA H. DASCHLE, Acting Administrator
Federal Aviation Administration,
NICHOLAS G. GARAUFIS, Chief Counsel,
Federal Aviation Administration,
LORETTA E. ALKALAY, Asst. Chief Counsel
Eastern Region, Federal Aviation
Administration
NATIONAL TRANSPORTATION SAFETY BOARD,
Respondents

PETITION FOR A WRIT OF CERTIORARI TO TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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May 2000

30pp

QUESTION PRESENTED

Was it an abuse of discretion for the District Court to impose Fed.R.Civ.P.11 and 28 U.S.C. § 1927 sanctions in the amount of $35,696.19, order forfeiture of a $20,000 bond filed by plaintiff for purposes of discovery, and disbar counsel in the District of Arizona, when the two causes of action were undeniably true, and Plaintiff was denied the opportunity to take depositions that would have proved their validity?

TABLE OF CONTENTS

QUESTION PRESENTED ..... First page
TABLE OF CONTENTS i
AUTHORITIES CITED iii
CITATIONS 1
JURISDICTION 1
RULES & STATUTES INVOLVED 1
STATEMENT OF THE CASE 1
Issues of the case-in-chief
REASONS FOR GRANTING WRIT 3
Exceptional Importance 3
ARGUMENT 5
Standards 5
Preface 5
FIRST CAUSE OF ACTION 6
Reasonable inquiry 13
SECOND CAUSE OF ACTION 15
Reasonable inquiry 19
RULE 11 AND RULE 12(b)(6) 20
Standards 20
The bond 23
The sanction 24
28 U.S.C. § 1927 24
CONCLUSION 25

AUTHORITIES CITED

Cases:

Adm'r v. Komjathy, NTSB Order No. EA-2343,
July 14, 1986 9
Appalachian Power Co. v. Train, 566 F.2d 451,
455 (4th Cir. 1977) 18
Air Transport Ass'n of America v. Dept. of Transp.,
900 F.2d 369 (D.C. Cir.); *vacated*,

498 U.S. 1077 (1991) 19
Conley v. Gibson, 355 U.S. 41 (1957) 21
Connally v. General Construction Co., 269 U.S. 385 (1926) 7
Cooter & Gell v. Hartmax Corp. 496 U.S. 384 (1990) 5,20,21
Cruz v. Savage, 896 F.2d 626 (1st Cir. 1990) 21
Eastway Const. Corp. v. City of New York, 762 F.2d 243 (2nd Cir. 1985) 21
Environmental Defense Fund, Inc. v. Gorsuch, 713 F.2d 802, 816 (D.C. Cir. 1983) 18
Golden Eagle Distributing Corp. v. Burroughs Corp., 801 F.2d 1531 (9th Cir. 1986); 809 F.2d 58 (9th Cir. 1987) 21
Grayned v. City of Rockford, 408 U.S. 104 (1972) 7
JM Mechanical Corp. v. U.S. By U.S. Dept. of HUD, 716 F.2d 190, 197 (3rd Cir. 1983) 23
Morton v. Ruiz, 415 U.S. 199 (1974) 16
Neitzke v. Williams, 490 U.S. 319 (1989) 21
Petition of Sichel, 39 C.A.B. 975 (1964) 17
Wilson v. Civil Aeronautics Board, 244 F.2d 773 (D.C. Cir. 1957) 10,11,12,15,23

Statutes:

Civil Aeronautics Act of 1938, § 609, 52 Stat. 1011 11
Federal Aviation Act of 1958:
§ 901(a)(1), 72 Stat. 783 9
§ 903(b)(1), 72 Stat. 786 10
5 U.S.C. § 551(4) 16,19
5 U.S.C. § 552 (a)(1) (D) & (E) 16
5 U.S.C. § 553 19
5 U.S.C. § 558 8,12,15
28 U.S.C. § 1927 5,24
49 U.S.C. § 1155 (1994) 9
49 U.S.C. § 1429(a) (1992) 2,7

49 U.S.C. § 1471(a)(1) (1992) 9
49 U.S.C. § 44709 (1994) 2,7
49 U.S.C. § 46301 (1994) 9
49 U.S.C. § 46305 (1994) 10

Federal Rules

Fed.R.Civ.P. 11 3,5,20,22,23,24
Fed.R.Civ.P.12(b)(6) 3,21,23
Sup.Ct.R.10(a) 3
Sup.Ct.R. 15(1) 5,24
14 C.F.R. pt 13 16
14 C.F.R. § 13.19 19
14 CFR §§ 20.37, 20.37110, 20.46, 20.463,
21.27110 (1938) 12

Miscellaneous:

Aviation Daily at 358, December 8, 1988 20
Compliance and Enforcement Program, FAA Order
2150.3A, ¶ 203, (e)(1)(B), p. 14 (1988) 16
Dept. of Commerce, Air Commerce Regulations
(1926) Sec. 74 12
S. Rep. No. 248, 79th Cong., 2d Sess. (1946) 8
S. Rep. No. 248, 79th Cong., 2d Sess. III (1946) 18
Smith, FAA PUNITIVE CERTIFICATE SANCTIONS:
THE EMPEROR WEARS NO CLOTHES;.
OR, HOW DO YOU PUNISH A PROPELLER?,
14 Transp. L.J. 59-100 (1985) 8,10,12
APPENDIX (separately bound)

Abbreviations:

DCSO — Dist. Ct. Rule 11 Sanction Order
DCDO — Dist. Ct. Dismissal Order
DCSD — Dist. Ct. Order staying discovery and imposing $20,000 bond
CMP — Complaint, Frye v. Pena

* * * * *

Petitioners Timothy P. Frye and his attorney Lawrence B. Smith, respectfully pray, that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit, entered in this proceeding October 22, 1999.

CITATIONS

Frye v. Pena, (unpublished) 199 F.3d 1332 (9th Cir. 1999); 1999 WL 974170. District Court Order imposing sanctions, 1997 WL 659817. (All relevant opinions are printed in the Appendix, A-00.)

JURISDICTION

The decision of the United States Court of Appeals for the Ninth Circuit sought to be reviewed was entered October 22, 1999; A-1. Order denying rehearing and suggestion for rehearing en banc, entered January 12, 2000; A-3. Jurisdiction of this Court is conferred by 28 U.S.C. § 1254(1). Application No. 99A790 was granted by Justice O'Connor March 23, 2000, extending time for filing from April 12, 2000 to May 11, 2000. Jurisdiction of the United States District Court, District of Arizona, based on 28 U.S.C. § 1331.

RULES AND STATUTES INVOLVED

Fed.R.Civ.P. 11, A-49
Fed.R.Civ.P. 12(b)(6), A-51.
Admin. Procedure Act, 5 U.S.C. —
§ 551(4), A-52.
§ 552(a)(1)(D) & (E), A-52.
§ 553, A-53.
§ 558(a) & (b), A-54.
§ 706, A-55.
28 U.S.C. § 1927, A-55.
Federal Aviation Act of 1958:
§ 609, A-56.
§ 901(a)(1) & (2), A-57.
§ 903(b)(1), A-57.

STATEMENT OF THE CASE

The Federal Aviation Administration initiated a punitive certificate sanction action against Plaintiff Timothy P. Frye and

Petitioner here, an Air Transport Pilot. Claimed authority was the Federal Aviation Act of 1958 (FA Act), section 609(a), now codified in 49 U.S.C. § 44709 (1994) (formerly codified as 49 U.S.C. § 1429(a) (1992), which is an accurate restatement of the FA Act.). His ATP was suspended for 90 days. (Reduced from 180 when it was explained to FAA counsel that two of the three charges of unairworthiness were false on their face). Remaining was the charge that he departed when the left outboard landing light bulb was missing. (Fact: it is legal to operate the aircraft with two of its four landing lights inoperative, as long as one is an inboard light; fact, the departure would have been perfectly legal had Nation's Air, which had leased it, was operating the plane.) On behalf of his employer, Capt. Frye was repossessing a Boeing 737 from Pittsburgh International Airport. Details are laid out in the Complaint ¶¶ 8-15. CMP A-44-46.)

Capt. Frye was represented by Washington counsel in the administrative action before the National Transportation Safety Board. The FAA Office of Chief Counsel, even though regional counsel had won the case before the Administrative Law Judge, rather than respond to Capt. Fry's brief on appeal to the full Board, dropped the case. Legal fees and costs came close to $100,000, about twenty-five percent of that for the district court action underlying this case. Even though Capt. Frye was not guilty of violating an airsafety rule. Throughout the FAA-NTSB case, to protect his right to fly and avoid the threat to his career as a major airline pilot, he would have paid a compromise civil penalty of up to $2000 to end that threat.

As the Question Presented indicates, Capt. Frye's counsel was severely sanctioned and the plaintiff's bond forfeited.

Issues of the case-in-chief — Early on, this attorney, on behalf of Capt. Frye, initiated an action in United States District Court, District of Arizona (CMP, A-43, et seq.), to have the action taken against Capt. Frye declared unconstitutional on two grounds: (1) FAA has no authority to impose license penalties because the executive branch, not the Congress, created license penalties; (2) the agency has no rule for that warns pilots that a

safety violation may lead to such a penalty. Capt. Frye also sought a preliminary injunction.

REASONS FOR GRANTING THE WRIT

Exceptional Importance — The United States Court of Appeals for the Ninth Circuit has sanctioned a departure from the accepted and usual course of judicial proceedings by the District Court so serious, as to call for the exercise of the Court's supervisory power. **Sup.Ct.R.10(a)**.

In filing its motion to dismiss, GMDS, A-57), the government failed to follow the mandates of the Federal Rules of Civil Procedure. It filed a Fed.R.Civ.P.12(b)(6) motion but totally failed to explain why the two basic causes of action failed to state claims upon which relief can be granted. The first cause charges that the executive branch created the policy of using license suspensions and revocation for the violation of airsafety rules, not the Congress, ergo, there is no statute that even hints at such a penalty. The second, besides no statute, the agency has never promulgated any rule that warns pilots and mechanics that it claims that power and authority. In short, there is no language in any official federal publication that even hints at the agency can use license penalties, rather than civil fines.

The District Court failed to follow the mandates of Fed.R.Civ.P.12(b)(6) and considered matters outside the complaint, but did not order the government to convert its motion to dismiss to a Fed.R.Civ.P.56 motion for summary judgment. By denying Plaintiff the right to take depositions, Fed.R.Civ.P.11 was also violated. This Court expressly amended that rule in 1993 to make certain that before the attorney was sanctioned he would have had the opportunity to do discovery. This is a classic case on the matter and in our view the federal judiciary should be reminded that these rules mean what they say. These rules are, of course, the backbone of assuring the citizen he will have his day in court.

The Court should also consider the importance of what Capt. Frye's counsel has been trying to do: bring to judicial recognition that a major system of punitive administrative

justice has no basis in law. FAA lawyers admit that most are inadvertent and ninety-nine percent plus are first offenses. FAA has advised this attorney that one million *active* pilots and mechanics hold FAA certificates. We estimate there are two to three thousand small operators, air-taxis, repair stations and the like, which also hold certificates subject to suspension and revocation strictly for airsafety violations. In fact even the large airlines are.

Another important reason for the Court to grant this petition is it will become aware from what has happened to Capt. Frye's attorney that **any lawyer seeking to vindicate the constitutional rights of his pilot-client will be discouraged from attempting to do so.** This, even though the facts here are indisputable. And we assure the Court that it is only the courts that can rectify these constitutional violations.

This is truly an extraordinary case — These are the unassailable facts:

(1) There is no language in any official federal publication — United States Code, Code of Federal Regulations, that even hints these certificates can be suspended or revoked as a penalty for the violation of an airsafety rule.

(2) Not only has there never been a statute, but no bill has ever been introduced in Congress to establish such penalties, consequently no legislative history.

(3) There once was a plain-spoken rule, beginning in 1926, but it disappeared in 1940 and none has taken its place. Why?

(4) Consequently, neither through Congressional hearings nor Administrative Procedure Act (APA) rulemaking procedures, has Congress or public had any say in the creation of FAA license penalties.

It may seem strange that proving this would be so difficult, when any judge's clerk can determine these facts with a modest amount of research in a law library, especially by using the search function in WestLaw or Lexis. This attorney, at least a dozen years ago, based on how government counsel consistently sidestepped the issues, realized that the only way these facts could be proven was to depose FAA lawyers. **How**

else can one find out how a system of punitive administrative justice works if there is nothing in any official federal publication that even hints at it, *except* by deposing those who know how it does — FAA lawyers?

At stake here is not only the integrity of the law practice, especially where the lawyer is working by the rules to bring to full consideration to an issue of enormous public importance, but the integrity of the Federal government itself is at stake. Thus we respectfully request the Court to exercise its inherent authority, expressed in Sup.Ct.R. 15(1), and order the Solicitor General to file a brief in opposition to this petition. Perhaps then this Court and the public can have an explanation in plain English of why there is no statute, no rule.

ARGUMENT

Standards — Capt. Frye's counsel was sanctioned under Rule 11 (A-49) and 28 U.S.C. § 1927 (A-55), as was the order of forfeiture of Plaintiff's $20,000 bond posted for purposes of discovery. Sanctions under Rule 11 and § 1927 are reviewed under the abuse of discretion standard. *Cooter & Gell v. Hartmarx Corp.* 496 U.S. 384, 405 (1990).

The sanctioned attorney's burden under Rule 11 is to demonstrate the following: 11(b), the causes of action were asserted "after an **inquiry reasonable under the circumstances**"; 11(b)(1), were not **"presented for any improper purpose"**; 11(b)(2), "are **warranted by existing law or the establishment of new law"**; and 11(b)(3) "the **allegations and other factual contentions have evidentiary support,** or after a reasonable opportunity for further investigation or discovery . . ." As to section 1927, did he **multiply the proceedings "unreasonably and vexatiously"** so as to support disbarment and an extreme money sanction? Or any sanction, whatsoever?

Preface— In its dismissal order the District Court said: "The Court finds that the Complaint asserts broad constitutional challenges . . . If the Court were to agree with Frye, it is possible that the Court might find it " just" to award monetary

damages." DCDO, A-28.[1] (No damages were sought.)

FIRST CAUSE OF ACTION[2]

20. The FAA's claim of authority to punish an airman for the alleged violation of a safety regulation by suspending his pilot's license is based on the Federal Aviation Act, § 609 **[Page 5]** (FA Act), 72 Stat. 779-80. The contention is that certain language in that section authorizes the FAA Administrator to suspend or revoke certificates anytime he deems "that safety in air commerce or air transportation and the public interest requires . . ."
21. Based upon this vague language federal aviation officials decided that it was in the interests of air safety to impose suspensions and revocations on certificate holders as punishment for safety violations—obviously figuring that no one could argue with the logic of that. This, even though no language is contained in Section 609 that so much as hints at a connection between the commission of a safety violation and suspension or revocation of a pilot's license, or any other certificate; no words, such as, "regulation," "violation," "sanction," or "penalty."
22. Thus, based on these officials' own statutory interpretation, logic dictates that the executive branch of the federal government, not the Congress, created certificate penalties. It is fundamental under Article I, § 1, of the Constitution that only the legislative branch of the federal government, not the executive, may create penalties, or benefits, *i.e.* food stamps. Thus the imposition upon Capt. Frye of a

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1 Does this not indicate the District Court is saying that the causes of action state claims upon which relief can be granted, and should have required the government to file an answer or motion for summary judgment? This is the first time in the many cases counsel has been involved in that *any* court has ever acknowledged this.

2 We urge the Court, before reading what follows, to read Counsel's U.S. General Accounting Office memo sent to the FAA Office of Chief Counsel in June 1980. GAO, A-90.

suspension of his pilot's license as a penalty for alleged air-safety violations violated his Fifth Amendment right to due process. [CMP A-48.]

* * * * *

FA Act § 609, in pertinent part, reads:[3]

> (a) The Administrator may, from time to time, **reinspect** any civil aircraft, aircraft engine, propeller, appliance, air navigation facility, or air agency, or may **reexamine** any civil airman. If, as a result of any such reinspection or reexamination, **or if, as a result of** any other **investigation** made by the Administrator, he determines that safety in air commerce or air transportation and the public interest requires, the Administrator may issue an order amending, modifying, suspending, or revoking, in whole or in part, any type certificate, production certificate, airworthiness certificate, airman certificate, air carrier operating certificate, air navigation facility certificate, or air agency certificate.

72 Stat. 779-80 (emphasis added.) (A-56).

A statute is unconstitutionally vague if persons of "common intelligence must necessarily guess at its meaning and differ as to its application." *Connally v. General Construction Co.*, 269 U.S. 385, 391 (1926), *see also, Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972) ("Vague laws offend several important values.") Do not government and courts owe airmen an explanation of how section 609 meets this test? Does not this standard apply also to agency rules?

This first cause of action was drafted with this specific APA

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3 This was accurately codified in 49 U.S.C. § 1429(a) (1992). However, during a recodification of all transportation law, it became 49 U.S.C. § 44709 (1994). The phrase "if as a result of" was dropped without any amendment to the Act authorizing it. Everything that follows it is a condition subsequent to first reinspecting and reexamining. It is really a grant of power for the Administrator *not* to take action if he deems it is not to be in the public interest.

mandate in mind:

> (a) This section applies, according to the provisions thereof, to the exercise of a power or authority.
>
> (b) A sanction may not be imposed or a substantive rule or order issued except within jurisdiction delegated to agency and as authorized by law. * * * * (A-54)

5 U.S.C. § 558 (a) & (b). Where does any act of Congress authorize suspension or revocation of a pilot's license for violation of a safety rule? The APA legislative history could not be more explicit:

> This provision, limiting administratively imposed requirements to the authority granted and delegated, is designed to afford statutory recognition for the basic rule of law, embodied in judicial decisions. ***The creation of penalties or benefits is exclusively the province of Congress.*** * * * *
>
> [It] means that agencies may not undertake anything which statutes or other adequate sources of authority (such as treaties) do not authorize them to do. Where these sources are specific in the authority granted ***no additional authority may be assumed. . . . Sanctions in the way of penalties or relief must be identified and authorized by law****, and where authorized they must in any case apply in the factual situation presented.*

S. Rep. No. 248, 79th Cong., 2d Sess. 34 and 274 (1946) (emphasis added).

Where does section 609 even hint at sanctions for violations?[4] Where is any legislative history? Any history that explains the language about air safety and public interest? FAA

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4 A thorough history of FAA enforcement may be found in this attorney's 42-page law review article: *Smith*, FAA PUNITIVE CERTIFICATE SANCTIONS: THE EMPEROR WEARS NO CLOTHES;. OR, HOW DO YOU PUNISH A PROPELLER?, 14 Transp. L.J. 59-100 (1985) (*"Emperor"*). This was based on the research we were able to do during a 1980 six-months consulting contract with the U.S. General Accounting Office on the legal aspects of FAA enforcement.

officials contend that is a broad grant of power for the Administrator to impose punitive certificate sanctions when he (meaning the officials to whom he delegates his authority) deems it to be in the interest of the public and air safety. NTSB has recognized the obvious, but refuse to do anything about it: "***This statute [609] does not explicitly state that the Administrator may suspend a certificate for violations of the FAR***," *Adm'r v. Komjathy*, NTSB Order No. EA-2343, July 14, 1986 (emphasis added); *see also*, *Komjathy v. National Transp. Safety Bd.*, 832 F.2d 1294 (D.C. Cir.) (per curiam), *cert. denied*, 486 U.S. 1057 (1988) (one of counsel's cases).

"Where these sources are specific in the authority granted *no additional authority may be assumed.*" If section 609 says nothing that hints at license penalties, then who else but the executive branch could have ***created*** the penalty? In its Motion to Dismiss the government admits that such sanctions are based upon an ***interpretation*** of the FA Act: "The interpretation of a statute by the agency charged with its administration generally is entitled to 'great deference.'" A-68. If the statute has to be "interpreted" by an agency in order to find authority for license penalties, then who else but the executive branch could have created the policy?

> The FA Act provides that:
>
> (a)(1) Any person who violates (A) any provision of titles III, V, VI, VII, or XIII of this Act, or any rule, regulation or order issued thereunder * * * shall be subject to a civil penalty of not to exceed $1,000 for each such violation * * *

72 Stat. 783, § 901(a)(1) (A-57). Previously codified in 49 U.S.C. § 1471(a)(1) (1992), it is now 49 U.S.C. § 46301 (1994); *see also* 49 U.S.C. § 1155 (1994). During recodification it too had its language changed in a critical aspect, also without authorization from Congress. The recodification reads: "*Any* person" is now "*A* person"; and "*shall be*" has become "*is*

liable."[5] Is section 901 of the Act's language not specific enough? Are not pilots entitled to an explanation by the government and courts as to why the section does not mean what it says in plain English?

The FA Act presents another conundrum:

> (1) Any civil penalty imposed or assessed under this chapter may be collected by proceedings in personam against the person subject to the penalty * * *. Such proceedings shall conform as nearly as may be to civil suits in admiralty * * * [and] **either party may demand trial by jury of any issue of fact**, if the value in controversy exceeds $20, and the facts so tried shall not be reexamined other than in accordance with the rules of the common law. * * * * [Language right out of the Seventh Amendment.]

72 Stat. 786, § 903(b)(1) (emphasis added). Previously accurately stated in 49 U.S.C. § 1473(b)(1) (1992), it is now in 49 U.S.C. § 46305 (1994). Thus it can be seen that the FAA decides whether or not a pilot charged with an airsafety violation can ever exercise his right to jury trial for "any violation"simply by placing the case on the 609 administrative track, rather than the civil penalty. (Confirmed by veteran FAA enforcement lawyer, John E. Marsh, Jr., *infra*.

How did all this came about? It is explained in *Emperor* in detail. Briefly, it all traces back to *Wilson v. Civil Aeronautics Board*, 244 F.2d 773 (D.C. Cir. 1957). *Wilson* is the touchstone for every 609 case thereafter. In an opinion, less than a page

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5 The government seems to have gone out of its way to assure the courts that this change, as well as the "if as a result of," referred to in footnote No. 3, was proper. In their motion to dismiss, footnote No. 1 (A-60), they said:

> 1 In 1994, Congress recodified the Act without substantive change at 49 U.S.C. §§ 40101 (1994), et seq. See Pub. L. No. 103-272, 103 Stat. 745, 1093 (1994). All references will be to the recodified Code sections.

Dropping "any person," "shall be," and "if as a result of," can hardly be said not to be "substantive" changes. Congress has never made such changes.

long, the District of Columbia Circuit held that section 609 of the Civil Aeronautics Act of 1938, 52 Stat. 1011 (essentially the same as the FA Act), with its language about public interest and air safety, constituted a broad grant of power to suspend a pilot's license as "a deterent sanction." 244 F.2d at 774.

The problem with this is that our research while at GAO uncovered the fact that Justice Department lawyers themselves made clear in their responding brief that **the 1938 Act had nothing to do with the authority claimed**. If true, that means *Wilson* has no validity as precedent. The issue before the D.C. Circuit was whether or not Congress had ever authorized license suspension and revocation for airsafety violations. Any argument would have to be conducted in the time-frame of the year involved, which as will be seen was 1926. One of Plaintiff's requests for admissions makes that clear:

> 68. In *Wilson*, government lawyers argued that section 3(f) of the 1926 Act, not section 609 of the 1938 Act, was the source of the suspension and revocation power for violations. They argued:
>
> > That Act directed the Secretary of Commerce "by regulation" . . ."to provide for the issuance and expiration, and for the suspension and revocation, of registration, aircraft, and airman certificates." (Section 3(f), 44 Stat. 570). There was no statutory specification of the grounds for suspension or revocation, this being a matter obviously left for the Secretary to establish. The first regulations adopted provided for suspension or revocation of licenses on numerous grounds, including "violating any provision of the Air Commerce Act of 1926 or these regulations," and "violating air traffic rules" ("Air Commerce Regulations," December 31 1926, Chapter 4, Sec. 74(a)(b).) [Actually, a & f.]
>
> (Brief for Respondent at 20-21, *Wilson v. Civil Aeronautics Board*, 244 F.2d 773 (D.C. Cir. 1957), (Docket No. 13553). If not available at the Department of Justice or FAA, it is readily available for reading and copying in the federal courthouse at 333 Constitution Avenue, N.W., Washington,

D.C. Excerpts may be found in the Marsh exhibit book previously supplied and mentioned in ¶ 2, supra.) (Cross-ref. No. 31-pp 8-9 of 12).[6]

FAA Assistant Chief Counsel for Enforcement Peter Lynch admitted the accuracy of this quote.(Docket 39, p.63.) It establishes prima facie that the Secretary of Commerce, ***i.e.*, the executive branch, created** license penalties. If that is not true, was it not up to the government to prove differently?

The District Court here, in its dismissal order, brushed all this aside but said that the "[C]ourts have interpreted later enactments as providing a *present* source of authority regarding suspensions or revocations." And called our argument "frivolous" and agreed with the government's characterization that we were playing a "semantic" game. (DCDO, A-31).[7] (All the briefs in *Wilson* were admitted in evidence as Exhibit No. 1 (certified by the U.S. Archives.) Neither District Court nor government has ever indicated what that later source of authority is, much less, quote its language or the case that

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6 Pilot's and mechanic's licenses will be suspended or revoked for--
(A) Violating any provision of the air commerce act of 1926 or these regulations. . . . .
(F) Violating air traffic rules.
Dept. of Commerce, Air Commerce Regulations (1926) Sec. 74. Suspension or revocation of licenses.

With the advent of the Code of Federal Regulations in 1938 Commerce officials republished Sec. 74, but split it up among various functions, like pilots, mechanics. *See* 14 CFR §§ 20.37, 20.37110, 20.46, 20.463, 21.27110 (1938). By 1940, however, these rules disappeared; why they did is explained in *Emperor* at 85-86. There has been no such rule ever since. Neither FAA nor Justice Department lawyers have *ever* explained why such a straightforward rules was appropriate from 1926 to 1939, but not today.

7 The government never even mentioned the executive-branch creation charge, nor section 558(b). What we have here is the District Court in effect making arguments for the defense even though Justice lawyers did not do so. In effect that court became the advocate for the government..

allegedly says so. The history of any bill, which is the only place such a change could have been made, would have to show recognition of the fact that theretofore such authority did not exist, or was so cloudy as to require clarification. Should not Capt. Frye have been able to follow up on this with a deposition of Mr. Lynch and require him to explain what the later authority is? There of course is none, or the government would have supplied it.

Reasonable inquiry — In the record in this case is a 460-page sworn statement, like a deposition, voluntarily given to this attorney by John E. Marsh, Jr. of Alexandria, Va. We worked with Mr. Marsh at FAA in 1967-68. Twenty-one years of his 30 years of government service, were in FAA enforcement, many years as chief of the Enforcement Policy branch. Retired in 1981, he remained active for as a contract instructor for several years at the FAA Academy. He was the Office of Chief Counsel's editor of a complete rewrite in 1980 into one volume of several enforcement manuals. He is the experts' expert on enforcement. We spent several hours with him in early 1996 explaining what was going on in the FAA with all the WWII pilots gone, replaced by youngsters without their experience and judgment. (Marsh was a B-24 pilot.) On February 20, 1996 he gave us his statement, taken down by a court reporter. It took eight intensive hours. We attached copies of the statement to plaintiff's motion to commence discovery by depositions and admissions, filed at commencement of the suit. It was to stop this discovery that defense counsel initiated a phone conference with the court. A separate volume of exhibits, prepared for Marsh's statement, was also submitted. Those were the ones listed in the Appendix at A-79. They are the documents defense counsel claimed were so burdensome.

We will just touch on a few highlights. Marsh agreed that choosing between a civil penalty and suspension sanction was a "troubling decision" and pointed out "That there is nothing historically in the FAA to give you any clear-cut guidance on that." (TR 92) When asked if this "leaves a lot to the subjective determination of the particular individual involved" he said,

"Yes. There's no doubt about that." (TR 104).[8] "Q — [I]sn't it a fact that it's a simple factual statement that if the FAA starts a case as a suspension action, then obviously there is never going to be any jury trial . . . A — Well, yes. If you're talking about a certificate action now, the administrative action substitutes for the jury trial." (TR 154). "Q — . . . [I] mean the fact is we've established that the FAA claim of authority stems from Section 609 and the language about the public interest and safety in air commerce as a broad grant of authority. A — That's right. And the FAA interprets that as Congress' intent to give the Administrator the broadest authority here, to give him very broad authority." (TR 300-07) By this Marsh was of course agreeing that there is no language in section 609 about sanctions for violations — not that anyone's agreement is necessary to establish that fact.

> Q — Well let me put it this simply: The airman, if he commits a safety violation, no qualifications matters involved, the fact is that he will only have an opportunity to have a jury trial and exercise his statutory right to demand a jury trial if the FAA officials who bring the charges decide to put it on the civil penalty track?
>
> A — That's right.

(TR 303) Marsh agreed that if a person with no valid license was caught flying an aircraft, they couldn't use section 609. "Q — That's because you can't do anything else to the person, isn't that correct? A — Well, yes." (TR 98, 140). So the pilot with no valid license who committed a most serious violation gets his right to jury, but one who has one and has committed the same violation is denied it. Is not this something which Capt. Fyre's counsel should have been able to depose Mr. Lynch and other FAA lawyers about?

The incredible situation of an agency lawyer deciding whether or not a citizen can exercise his right to a congressionally mandated jury trial is something we recognized

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8 *See* Nov. 1967 memo from Jennings Roberts. (A-85).

within a few weeks of going to work at FAA in late October 1967. We read all the various aviation acts and came to understand the system's basics. When we asked our branch chief about it, all he would say was, "The courts have approved it." He was of course referring to *Wilson*.

Using the search function on our word processor the only place in the Appendix where section 558(b) is mentioned is in the dismissal order. DCDO, A-30. The government made no mention of it, yet it is as the heart of the first cause of action. Even were there some merit to the District Court's position, how can it be said that what we have laid out here (and in virtually every other court we have been in) is not a reasonable argument?

THE SECOND CAUSE OF ACTION

> 23. Although they have claimed authority to impose license penalties for almost four decades, FAA officials have never given the public any notice of this in the Code of Federal Regulations — or any other official federal publication — that they make such a claim. This failure to tell airmen, including Capt. Frye, that their licenses are at risk for the violation of a safety rule violated his Fifth Amendment right to due process. [A, 48]

* * * * *

As is the first, the second cause of action is strictly governed by the APA, as well as fundamental concepts of due process. Relevant parts read:

> (a) Each agency shall make available to the public information as follows:
>
> (1) Each agency shall separately state and currently publish in the Federal Register for the guidance of the public —
>
> * * * *
>
> (D) substantive rules of general applicability adopted as authorized by law, and statements of general policy or interpretations of general applicability formulated and adopted by the agency; and
>
> (E) each amendment, revision, or repeal of the foregoing.
>
> ***Except to the extent that a person has actual and timely***

notice of the terms thereof, a person may not in any manner be required to resort to, or be adversely affected by, a matter required to be published in the Federal Register and not so published. * * * *

5 U.S.C. § 552 (a)(1) (D) & (E) (emphasis added). A-52.. Paragraph (E) is a legislative exclusionary rule.

How can it be argued that the FAA's punitive certificate sanction policy does not meet the APA definition of a rule? It states: "(4) 'rule' means the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, **interpret**, or prescribe law or policy or describing the organization, procedure, or practice requirements of an agency * * *". 5 U.S.C. § 551(4) (emphasis added). A-52

The government freely admits the license penalty policy is based upon an "interpretation" of section 609. GMDS, A-55. So how do they explain section 552? They don't, just ignore the issue.

Although not in the Federal Aviation Regulations (FARs), 14 C.F.R. pts 1-199, *see esp.* Part 13, the use of certificate penalties is spelled out in FAA's enforcement manual: **"Formal legal action is undertaken to -- . . . B. Impose punitive sanctions, after the act, to deter violations (e.g., certificate actions, civil penalties) . . ."** Compliance and Enforcement Program, FAA Order 2150.3A, ¶ 203, (e)(1)(B), p. 14 (1988) (emphasis added). Agency manuals, of course, do not rise to the level of official publications. This Court has squarely held that placing a policy in an agency manual and not having it published in accordance with APA requirements violates that act. *Morton v. Ruiz*, 415 U.S. 199 (1974). "The Administrative Procedure Act was adopted to provide, *inter alia*, that administrative policies affecting individual rights and obligations be promulgated pursuant to certain stated procedures so as to avoid the inherently arbitrary nature of unpublished *ad hoc* determinations." *Id.* at 232. "The BIA [Bureau of Indian Affairs] itself has recognized the necessity of formally publishing its substantive policies and has placed itself under the structure of the APA procedures . . ." *Id.* at 233.

As does BIA, FAA policies require agency officials to follow the APA:

> A primary Congressional consideration underlying the Administrative Procedure Act is that a regulatory agency afford the public an opportunity to participate in its rulemaking processes. Both the letter and the spirit of the rulemaking provisions of this act shall be observed. FAA follows the principle that the public interest is best served when regulatory affairs are open to the public to the fullest extent possible.

FAA Rulemaking Policies, FAA Order 2100.13, ¶ 22 (a) at p. 8 (1976). This Order also provides that the Office of Chief Counsel is responsible for "determining the legal adequacy of agency actions related to rules and regulations. . . .[and] Reviewing **internal directives and advisory circulars to assure they are neither used for nor have the effect of regulations and are consistent with the regulations.** Id. at ¶ 22(a) & ¶ 33(b) (emphasis added.). Would this not be a key FAA order about which Capt. Frye's attorney should have had the opportunity to question FAA lawyers about in order to determine agency compliance with it — and with the APA?

In the only such FAA administrative case we are aware of, the Civil Aeronautics Board squarely upheld the need to have rules. The FAA has a rule in their manual which they use as the basis to revoke airman and operators when they are charged with one or more safety violations, but not for failing, for instance, a reexamination, a true qualifications matter. They contend that the airman, for instance, lacks the "care, judgment and responsibility" required of a certificate holder and, *therefore*, the qualifications to hold it.

They used it at least once to deny an application for a student license. *See Petition of Sichel*, 39 C.A.B. 975, 976-77 (1964). It was made by a pilot whose private license had been suspended, but he was caught flying during that suspension, then revoked. He waited the required period of time and applied for the student license. (He could as well have applied for a private, but evidently thought starting at the bottom was safer.)

The FAA denied the application on the care-judgment basis. His lawyer appealed to the CAB. (NTSB succeeded to its quasi-judicial functions in 1966.) The Board indicated it thought the FAA had the authority to lay down such standards, but said: "I]t does not follow that the administrator may apply such standards to applicants where he has not prescribed [them] . . . in the Regulations. . . . [I]t is our view that applicants for certificates are entitled to have *notice* of the eligibility requirements which they must meet. . . ." *Id.* at 976 (emphasis added). "Notice," of course, is a due process concept, precisely the purpose behind the APA. In a footnote, as further support for its decision overturning the denial and requiring FAA to issue the license, CAB cited the APA. *Id.* at 977 n. 10. (We likely would have never learned of this case except for the fact John Marsh told this attorney about it when we were at GAO.)

Senator Pat McCarron (McCarron Field, Las Vegas), Judiciary Chairman and sponsor of the APA, had this to say (among many similar statements) about his bill:

"[I]t is a comprehensive charter of private liberty and a solemn undertaking of official fairness." S. Rep. No. 248, 79th Cong., 2d Sess. III (1946). "It affords private parties a means of knowing what their rights are and how they may protect them . . ." *Id.* at 250."[The] bill [is] to my mind and to the mind of the bar of America . . . one of the most important measures that has been presented to the Congress of the United States in its history." *Id.* at 297.

The courts: "Any agency regulation that so directly affects preexisting legal rights or obligations . . . indeed, that is 'of such a nature that knowledge of it is needed to keep the outside interests informed of the agency's requirements in respect of any subject within its competence,' is within the publication requirement [of the APA]." *Appalachian Power Co. v. Train*, 566 F.2d 451, 455 (4th Cir. 1977). "Any claim of exemption from APA rulemaking requirements 'will be narrowly construed and only reluctantly countenanced.' [Citing cases]" *Environmental Defense Fund, Inc. v. Gorsuch*, 713 F.2d 802, 816 (D.C. Cir. 1983). There is a plethora of such cases. The

D.C. Circuit noted there is ***"No question that the Penalty Rules fall within the scope of the APA's rulemaking provisions.*** *See* 5 U.S.C. § 551(4)-(5) (1988). . . ." *Air Transport Ass'n of America v. Dept. of Transp.*, 900 F.2d 369, 375-78 (D.C. Cir.) (invalidating FAA rules promulgated to create a civil penalty hearing program); *vacated to determine mootness*, 498 U.S. 1077 (1991) (emphasis added).

How is it that this attorney, since 1985, on behalf of his clients, most of whom were severely hurt by FAA punitive certificate action, can present all or part of the APA bill's history, and quote the APA, to numerous district and courts of appeals, cite cases like those above, and all of them ignore such compelling authorities and fail to explain how the FAA license-penalty policy meets APA requirements? Not even 14 C.F.R. § 13.19, which is a paraphrase of section 609 and which the government and courts seem to contend is an adequate rule, DCSO, A-11, was ever put through the public notice and comment procedure required by 5 U.S.C. § 553. The District Court cites several cases (all of them this attorney's) which hold that "the APA does not require the FAA to promulgate a rule or to publish a policy stating that it may suspend a pilot's certificate for violations of the Federal Aviation Regulations." DCSD, A-38. This a truly incredible statement. Where's the analysis? None exists, or defense counsel and the courts would have certainly cited it. Moreover, as in the instant case, the district courts dismissed before the government ever had to enter an answer or motion for summary judgment.

Reasonable inquiry — Here's what John Marsh had to say about a rule:

> Q — All right, let's talk about the regulations that are not on the books. . . .
>
> One, as a basic proposition, and I submit this as a fact and you can correct me if I am wrong, the FAA has no regulation that tells airmen that if you commit a violation, you can lose your license as a, whatever you call it, sanction, punishment, because air safety requires and so forth? Isn't that a fact?

A — Yes, there is no regulation that spells it out like that. I think every airman realizes that if you violate the FARs, depending on the situation, you could have action against your certificate.

Q — How would he find that out?

A — Other than plain common sense, is all I know Larry. (TR 323-24).

Back in 1988 this attorney asked Senator Dennis DeConcini (D-Ariz.) to request the Administrative Conference of the U.S. (ACUS) to study FAA's two-track system of enforcement. Done by ACUS research director, Jeff Lubbers, and as reported in *Aviation Daily*, these were some of its conclusions: "The study ... concluded that 'the cumbersomeness of the original civil penalty process gave FAA an incentive to use the suspension/revocation track as its primary enforcement tool. This was due to an unfortunate procedural anomaly — the harsher section (revocation/suspension) was easier to invoke.'" *Aviation Daily* at 358, December 8, 1988. "Smith also had contended that FAA should be doing more 'to publicize and disseminate' enforcement policies and procedures, a notion Lubbers found 'more troubling.' He said Congress may want to address the question of the agency's reluctance to provide such explanation because it fears it would be 'swamped with trials' if pilots knew how easy it was to appeal to NTSB. 'Mr. Smith seems to have tapped into a rather rich vein of discontent about FAA's unwillingness to articulate and disseminate its policies in a meaningful way to affected parties. I would hope that this topic would also receive further consideration by Congress and FAA,' Lubbers said." *Id.*

RULE 11 AND RULE 12(b)(6)

Standards — Has the attorney made a reasonable prefiling inquiry into the facts? Is his pleading supported by existing law or a good faith argument to change it? *Hartmarx* at 496 U.S. 399. The government should explain in detail why counsel failed to meet these standards.

Rule 11 is not intended to chill creativity that "is the very lifeblood of the law. Vital changes have been wrought by those

members of the bar who have dared to challenge the received wisdom, and a rule that penalized such innovation and industry would run counter to our notions of the common law itself. *Eastway Const. Corp. v. City of New York*, 762 F.2d 243, 254 (2nd Cir. 1985). "What is at stake is often not merely the monetary sanction but the lawyer's reputation." *Golden Eagle Distributing Corp. v. Burroughs Corp.*, 801 F.2d 1531, 1540 (9th Cir. 1986); 809 F.2d 58 (9th Cir. 1987).

Can this be said about Capt. Frye's counsel? "[t]hrough out the pre-trial proceedings plaintiff's attorney continually engaged in obfuscation of the issues, hyperbolism and groundless presumptions" in addition to insinuating that the court was biased." . . . The plaintiff's attorney also refused to produce [evidence] . . ." *Cruz v. Savage*, 896 F.2d 626, 634 (1st Cir. 1990).

"A district court would necessarily abuse its discretion if it based its ruling on an erroneous view of the law or on a clearly erroneous assessment of the evidence. *Hartmarx at* 496 U.S. 405. "What Rule 12(b)(6) does not countenance are dismissals based on a judge's disbelief of the complaint's factual allegations. District court judges looking to dismiss claims on such grounds must look elsewhere for legal support." *Neitzke v. Williams*, 490 U.S. 319, 327 (1989). Is this not precisely what the record here reflects? "A court may dismiss a complaint only if it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations." *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957). How can it be said that Capt. Frye could not have proved that the executive branch created license penalties — especially when the government admits the policy is based on a statute that contains not a hint at sanctions, penalties, or rules violations? If there is a rule, all the government has to do is quote its language and explain how any reasonable person would understand what it says.

Having found legitimate constitutional claims, was it not the District Court's duty under Rule 12(b(6) to require the government to convert its motion to dismiss to a Rule 56 motion for summary judgment? Which would have opened up

discovery? Its duty to follow Rule 11(b)(3), which makes clear the attorney should have that opportunity? We can flatly state that if any of the district court cases which are bandied about by the government as meaning something had ever allowed Petitioner and his attorney to take depositions these issues would have been resolved years ago and we would not be here.

We had the greatest respect for the late and Honorable Richard M. Bilby. It was because of that, we persuaded our client and his supporters to put up the $20,000 bond. We believed firmly that once Judge Bilby had the facts, he would let the case go forward. Unfortunately the whole situation was colored by his conviction that we had deliberately lied to him about our failure to remember the extent of his order in any earlier case instructing us not to file any further such. We had no motive to violate that order, in fact would have been far better off to have sought an ex parte order before filing, since we had the Marsh statement by then and would have had Judge Bilby's complete attention. *See* our letter to him at A-75. Unfortunately now at an age where sometimes it is difficult to remember some things, we forgot about that letter, or would have brought it to his attention in this action. Perhaps it would have softened his attitude. (He did have something kind to say: "One mitigating factor is Smith's respectful demeanor at hearings." DCSO, A-17.

In a nutshell the government's strategy in all these cases, district court and petition for review, has been to *never* deal with the causes of action and the issues they raise, but always to immediately embark on a discourse about section 609, implying that statute covers all sins. Their motion to dismiss here, A-57, is an excellent example, because nowhere in it is mentioned the relevant APA statutes. They also keep playing the refrain that all this attorney is doing is harassing the government and on a personal vendetta against individuals within it.

This kill-the-messenger strategy has been enormously successful, as this case indicates. Judge Bilby questioned our mental state. DCSO, A-1, A-22. Evidently a great many people

would not agree, which is why we have included certain exhibits in the appendix. They provide a short outline of our years of effort to force reform of FAA enforcement

Judge Bilby, as his sanction order reflects, heavily used our response to his order to show cause in order to bolster his conviction of our wrongdoing. We stand by everything we said in it — it was under oath. It is unfortunate he misunderstood so much and that we had no opportunity in an open and unhurried hearing to explain anything he did not understand or misinterpreted — which was a great deal.

Judge Bilby, before dismissal considered several matters "outside the bounds of the complaint." By doing so, under Rule 12(b)(6), the merits of the claims should have been "tested by way of motion for summary judgment." *JM Mechanical Corp. v. U.S. By U.S. Dept. of HUD*, 716 F.2d 190, 197 (3rd Cir. 1983). In those matters were: (1) An Affidavit from Peter Lynch, FAA Assistant Chief Counsel for Enforcement, citing what he contends is FAA's authority and rule for license penalties;[9] (2) Lynch's responses to the request for admissions; (3) Exhibit No. 1, certified copies of the briefs in *Wilson*; (4) Exhibit No. 2, a copy of an FAA enforcement policy published in the Federal Register but not promulgated as a formal rule; (5) copies of several complaints filed in other cases filed by counsel. Counsel should have had the right to depose Mr. Lynch and others, like John Marsh.

The bond — The bond was put up strictly for discovery purposes. Forfeiting it would constitute a sanction against the plaintiff. That is specifically forbidden by Rule 11(c)(2)(A): "Monetary sanctions may not be awarded against a represented party for a violation of subdivision (b)(2)."

The sanction — At least 98% of the amount claimed by

---

9 The District Court ordered this during a telephone conference before the government had made a formal appearance. This is when Counsel asked if the Judge would at least let Capt. Frye submit a request for admissions. The Court agreed.

Justice Department lawyers had to be due to the request for admissions. It is a joke. The documents they complain about are those on the Marsh exhibit list. Mr. Lynch could easily verify each one in less than an hour, the spend perhaps half a day dictating his response to all the requests. All except for a mere handful, a few we knew couldn't be, were not in the request. They speak for themselves. Mr. Lynch was the one providing the responses to the requests. For Justice lawyers, 275 hours? They have so many previous motions to dismiss, that pleading could not have taken more than ten hours. For an FAA attorney (as much a part of Justice counsel's client as is Mr. Lynch), 85.5 hours? A-20.

28 U.S.C. § 1927 — Section 1927 "applies only to unnecessary filings and tactics once a lawsuit has begun." *In re Keegan Management Co., Securities Litigation,* 78 F.3d 431, 435 (9th Cir. 1996). As such, an attorney is subject to sanctions under this section for all proceedings other than the filing of the complaint. *Id.*" DCSO, A-8. The District Court's only basis for this sanction was the request for admissions, which it had approved. The only glytch came when defense counsel complained about their size and made a motion to stop discovery altogether, rather than ask the court to have plaintiff reduce their scope. (It was in response to this that the court ordered the plaintiff to post the $20,000 bond.) Every one of the requests related directly to the issues in this case. The documents were prepared for Mr. Marsh's statement. Is it proper to use section 1927 as a sanction for those requests when they were the only filing by the plaintiff after the case was initiated, and submitted for purposes of discovery, to then sanction counsel and disbar him? Was the request unreasonable and vexatious? How was it "unnecessary"? Rule 11(d) specifically provides that sanctions "do not apply to disclosures and discovery requests . . ." How is it fair to use either that rule or 1927 on such a basis?

We respectfully repeat our request that the Court, pursuant to Sup.Ct.R.15(1), order the government to file a response to this petition.

CONCLUSION

For these various reasons, this petition for certiorari should be granted.

Respectfully submitted,

Lawrence B. Smith
Counsel for Petitioner

Supreme Court, U.S.
FILED
991820 MAY 10 2000
OFFICE OF THE CLERK

NO._____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1999

TIMOTHY P. FRYE, **Petitioner,**

v.

FREDERICO PENA, Secretary,
Department of Transportation
LINDA H. DASCHLE, Acting Administrato
Federal Aviation Administration,
NICHOLAS G. GARAUFIS, Chief Counsel,
Federal Aviation Administration,
LORETTA E. ALKALAY, Asst. Chief Counse
Eastern Region, Federal Aviation
Administration
NATIONAL TRANSPORTATION SAFETY BOARD,
Respondents

PETITION FOR A WRIT OF CERTIORARI TO TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

APPENDIX TO ACCOMPANY THE PETITION

LAWRENCE B. SMITH
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May 2000

103pp

APPENDIX

TABLE OF CONTENTS

9TH Cir. Memorandum Opinion (10/02/99) A-1

9th Cir. Order Denying Rehearing (01/12/00) A-3

Dist. Ct. Rule 11 Sanction Order (10/02/97) A-4

Dist. Ct. Dismissal Order (04/20/97) A-25

Dist. Ct. Order staying discovery
and imposing $20,000 bond (02/21/97) A-39

Complaint, Frye v. Pena (01/06/97) A-43

RULES & STATUTES

Fed.R.Civ.P.11 ..... A-49

Fed.R.Civ.P.12(b)(6) A-51

Admin. Proc. Act, 5 U.S.C. A-52

§ 551(4) A-52

§ 552(a)(1)(D) & (E) A-52

§ 553 ..... A-53

§ 558(a) & (b) A-54

§ 706 ..... A-55

28 U.S.C. § 1927 ..... A-55

Federal Aviation Act of 1958

§ 609(a) A-56

§ 901(a)(1) & (2) A-57

§ 903(b)(1) A-57

EXHIBITS

Defendants' memorandum in support of
motion to dismiss A-57

Counsel's letter to Judge Bilby A-75

Content list for Marsh exhibits A-79

Lawrence Smith, published aviation articles A-83

LBS FAA cases tried-familiar with A-84
(1967) Jennings Robert memo re *LBS* A-85
(1970) *Washington Monthly* letter A-87
(1970) Fund for Investigative Journalism letter A-87
(1970) *Washington Post* re LBS FOIA suit A-88
(1979) Air Transport Ass'n letter A-89
(1980) U.S. GAO Memo to FAA Chief Counsel A-90
(1980) Rep. Barry Goldwater, Jr. A-96
(1983) Frank Kingston Smith A-97
(1990) J. Scott Hamilton, Esq., letter A-98

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FILED OCTOBER 22, 1999
NOT FOR PUBLICATION[1]
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT
No. 97-17344
D.C. No. CV-97-00010-RMB

TIMOTHY FRYE, Plaintiff-Appellant,

v.

FEDERICO PENA, Secretary, Department of Transportation; et al., Defendants-Appellees.

MEMORANDUM

Appeal from the United States District Court
for the District of Arizona
Richard M. Bilby, Chief District Judge, Presiding

Argued and Submitted September 16, 1999
Pasadena, California

[Page 2] Before: B. FLETCHER and PREGERSON, Circuit Judges, and WEINER, District Judge.[2]

Attorney Lawrence Smith appeals the district court's order

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1 This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as may be provided by Ninth Circuit Rule 36-3.

2 The Honorable Charles R. Weiner, Senior United States District Judge for the Eastern District of Pennsylvania, sitting by designation.

sanctioning him for filing a frivolous lawsuit and for violating the district court's order restraining him from filing similar lawsuits without prior court permission.

As attorney for Timothy Frye, Smith filed a complaint challenging the Department of Transportation's authority to suspend Frye's pilot certificate. The complaint also alleged that the Federal Aviation Administration's ("FAA's") administrative proceedings violated Frye's Fifth Amendment due process rights, and that the FAA violated the Administrative Procedures Act by failing to publish its policies regarding license penalties. Smith had previously filed numerous actions raising the same contentions. The actions had been uniformly rejected.

The district court granted defendants' motion to dismiss citing several Ninth Circuit cases where Smith had personally raised the same frivolous claims. See *Foster v. Skinner*, 70 F.3d 1084, 1088 (9th Cir. 1994) ("[The Ninth Circuit has held] that the FAA has authority to select and impose sanctions on certificate holders, and that FAA regulations were properly adopted and are constitutional.")

[Page 3] The district court held a hearing on its order to show cause as to why Smith should not be disbarred from practicing in the District Court of Arizona and should not be sanctioned for violating Federal Rule of Civil Procedure 1 1, 28 U.S.C.§ 1927 and Arizona Ethical Rules 3.1 and 3.3(a)(1). The district court found that Smith: (1) had filed a frivolous lawsuit in bad faith and for the sole purpose of harassing defendants; (2) had made intentional misstatements designed to mislead the court; (3) had disobeyed the court's prior injunction precluding him from filing similar lawsuits; and, (4) given the opportunity to dismiss the case, had refused to do so, thereby needlessly multiplying the proceedings.

The district court then ordered Smith: (1) disbarred from the practice of law in the federal courts of the District of Arizona; (2) to pay defendants reasonable attorneys' fees in the amount of $34,117.68 and travel costs in the amount of $578.51; and (3) to forfeit to defendants as partial payment for assessed fees and costs a $20,000.00 bond the court had ordered

Smith to post as a condition precedent to the court's granting discovery in this case. Smith and Frye appeal.

We have jurisdiction under 28 U.S.C. § 1291, and we affirm.

We agree with the district court's careful, thorough, and painstaking analysis of the issues presented in this case. The district court's reasoning amply demonstrates that Smith brought and pressed frivolous claims, made personal **[Page 4]** attacks on various government officials in bad faith and for the purpose of harassment, and demonstrated a lack of candor to, and contempt for, the court. The district court was well within its discretion in imposing monetary sanctions against Smith under 28 U.S.C. § 1927 and in disbarring him under Rule 11. Accordingly, the district court's order sanctioning Attorney Lawrence Smith is

AFFIRMED.

FILED JAN. 12, 2000
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT
No. 97-17344

TIMOTHY FRYE, Plaintiff-Appellant
v.
FEDERICO PENA, Secretary, Department of Transportation, et al.,
Defendants-Appellees

Before: B. FLETCHER and PREGERSON, Circuit Judges, and WEINER, District Judge.[1]

The panel, as constituted above, has voted to deny appellant's petition for rehearing. Judge Pregerson voted to

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1 Honorable Charles R. Weiner, Senior United States District Judge for the Eastern District of Pennsylvania, sitting by designation.

reject the suggestion for rehearing en banc and Judges B. Fletcher and Weiner so recommended the rejection of the suggestion for rehearing en banc.

The full court was advised of the suggestion for rehearing en banc and no judge of the court has requested a voted on the suggestion for rehearing en banc. Fed.R.App.P.35(b).

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

FILED OCTOBER 2, 1997
IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZ
NO. CIV 97-10 TUC RMB
TIMOTHY P. FRYE, Plaintiff,
vs.
FREDERICO PENA, Secretary Department
of Transportation, et al., Defendants.

ORDER

I. Introduction

The Court must decide whether to sanction attorney Lawrence B. Smith for filing this patently frivolous lawsuit. Smith also disobeyed this Court's prior injunction precluding him from filing lawsuits such as this one without prior court permission. Given the opportunity to dismiss this case, he refused to do so. As such, he needlessly multiplied the proceedings. All because he believes the federal courts across the nation do not grasp his legal theory and/or have been deceived by government attorneys.

In granting Defendants' Motion to Dismiss, the Court issued an order to show cause as to why Smith should not be disbarred and otherwise sanctioned for his misconduct. Smith was explicitly ordered to address the applicability of Fed. R. Civ. P. 11(b)(1) and (2), ER 3.1 and 3.3(a)(1), Arizona Rules of Professional Conduct, 28 U.S.C. § 1927, and this Court February 21, 1997 Order. Ignoring the Court's directive, Smith limited his response to the inappropriateness of Rule 11.

Defendants respond that the record establishes that Smith's vexatious lawsuits are malicious, intended to harass governmental agencies, and therefore, brought in bad faith. Defendants assert that Smith's conduct has been tolerated long enough and that serious measures are warranted. Accordingly, they request that Smith be assessed monetary sanctions, disbarred from federal court in this District, and a complaint made to the State Bar of Arizona.

On July 7, 1997, the Arizona Supreme Court entered a Mandate and Order suspending Smith from the practice of law in Arizona for failure to comply with Arizona's mandatory continuing legal education requirements. As a result, Smith was also suspended from further practice in this District. *See* Local Rule 1.6(c). Smith has apprized the Court that he intends to appeal the suspensions. Given the seriousness of Smith's conduct here, and the fact that the suspensions could be easily rectified, the Court shall still consider the sanction of disbarment.

II. Background

Plaintiff Timothy P. Frye's air transport pilot certificate was suspended 90 days when he repossessed a B-747 [sic] aircraft which was later found not to be airworthy. On January 6,1997, Frye, through counsel Lawrence B. Smith, Gary S. Grynkewich, and Edward S. Coleman filed suit and a motion for preliminary injunction with regard to the suspension. Frye claimed that his Fifth Amendment due process rights and the Administrative Procedures Act were violated when: (1) the Federal Aviation Administration ("FAA") relied on Section 609 of the Federal Aviation Act of 1958,49 U.S.C. § 44709 (1994) to suspend his license, (Complaint, ¶ 21); and (2) the FAA failed to provide notice through publication of a rule regarding its policy to impose suspensions and revocations as a penalty for violation of air safety rules. (Complaint, ¶ 23).

In connection with the motion for preliminary injunction, Frye sought permission to conduct discovery by propounding a Request for Admissions on Defendants. The Court questioned whether discovery was warranted given the fact that the legal

issues had been previously resolved by appellate courts nationwide. Before allowing the requested discovery, the Court warned Frye's three attorneys of their **Page 2]** ethical obligation under ER 3.1 and that if the claims were later found to be identical to claims consistently rejected by the Ninth Circuit, counsel risked sanctions and a state bar complaint. The Court ordered counsel to re-evaluate the case in light of prior circuit precedent and to post a $20,000 bond if they elected not to dismiss the case. *See* Order of February 21, 1997. Grynkewich filed a motion to withdraw stating that he "took steps toward having the action dismissed, however Larry Smith refused to join in said stipulation." *See* Motion to Withdraw as Counsel of Record at 1. The Court subsequently granted Grynkewich's motion. *See Frye v. Pena,* No. CIV 97-10 TUC RMB (D.Ariz. Mar. 28, 1997). On March 25, 1997, Plaintiff Prye also stipulated to the withdrawal of both Grynkewich and Coleman.

Smith, on the other hand, posted the required bond and submitted his Request for Admissions to the Defendants. Defendants diligently completed the voluminous Request which included 106 admissions with various subparts. Defendants also reviewed over 200 pages of documents to confirm or to deny whether the documents were "genuine."

On May 20, 1997, the Court granted Defendants' motion to dismiss finding Frye's claims barred by Ninth Circuit precedent. Specifically, the Court found "Smith knew that his legal arguments in this case were 'unwarranted by existing law' and that they could not be considered 'nonfrivolous arguments for the extension, modification, or reversal of existing law' ...." *See* Order of May 20, 1997 at 12. Smith was ordered to show cause "why he should not be disbarred from practicing in the District of Arizona, why a State Bar complaint should not be filed and why he should not be sanctioned for violations of Fed. R. Civ. P. 11, ER 3.1 and 3.3(a); 28 U.S.C. § 1927; and the Court's February 21, 1997 Order." *Id.* at 14. **[Page 4]**

II. A Lawyer's Ethical Obligations

A lawyer practicing in federal court in Arizona is required to follow the Rules of Professional Conduct as set forth in Rule

42 of the Rules of the Supreme Court of the State of Arizona. *See* Rules of Practice of the United States District Court for the District of Arizona, Rule 1.6(d). Under Arizona's ER 3.1, "[a] lawyer shall not bring . . . a proceeding, or assert or controvert an issue . . . unless there is a basis for doing so that is not frivolous, which includes a good faith argument for an extension, modification or reversal of existing law." 17A A.R.S. S.Ct. Rules, Rules of Professional Conduct, Rule 42, ER 3.1 (1985). A lawyer is also ethically obligated to exhibit candor to the court: "A lawyer shall not knowingly, make a false statement of material fact or law to a tribunal." *Id.* at ER 3.3(a)(1).

The Federal Rules of Civil Procedure provide that an attorney who files a pleading is:

> certifying that to the best of the person's knowledge., information and belief, formed after an inquiry reasonable under the circumstances,
>
> (1) it is not being presented for any improper purpose, such as to harass or to cause unnecessary delay or needlessly increase the cost of litigation;
>
> (2) the claims, defenses, and other legal contentions therein are warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law.

Fed. R. Civ. P. 11(b)(1) and (2). Thus, Rule 11 provides for the imposition of sanctions when a filing is frivolous, legally unreasonable, or without factual foundation, or is brought for an improper purpose. *Simpson v. Lear Astronics Corp.*, 77 F.3d 1170 (9th Cir. 1996). Frivolous filings are "those that are both baseless and made without a reasonable and competent inquiry." *Buster v. Greisen,* 104 F.3d 1186, 1190 (9th Cir. 1997. A claim that is unfounded on existing law, but that straightforwardly seeks a change in existing law that is not utterly implausible, should, in the absence of clear evidence of a

different subjective intent, be considered brought in good faith. *In re* **[Page 5]** *Ronwin,* 113 Ariz. 357, 555 P.2d 315, 318 (Ariz. 1976), *cert. denied,* 430 U.S. 907 (1977), and *cert. denied,* 439 U.S. 828 (1978). That is not the case here.

> Additionally, federal law provides:
>
> Any attorney or ocher person admitted to conduct cases in any court of the United States or any Territory thereof who so multiplies the proceedings in any case unreasonably and vexatiously may be required by the court to satisfy personally the excess costs, expenses, and attorneys' fees reasonably incurred because of such conduct.

28 U.S.C. § 1927. Section 1927 "applies only to unnecessary filings and tactics once a lawsuit has begun." *In re Keegan Management Co., Securities Litigation,* 78 F.3d 431, 435 (9th Cir. 1996). As such, an attorney is subject to sanctions under this section for all proceedings other than the filing of the complaint. *Id.* Before a court may engage in any fee-shifting sanctions under § 1927, it must find that "the attorney acted recklessly or in bad faith." *Goehring v. Brophy,* 94 F.3d 1294, 1306 (9th Cir. 1996), *cert. denied,* _U.S._117 S.Ct. 1335, 137 L.Ed.2d 495 (1997. The Ninth Circuit has further defined this requirement to hold that section 1927 sanctions "must be supported by a finding of subjective bad faith." *Keegan,* 78 F.3d at 436. "Bad faith is present when an attorney knowingly or recklessly raises a frivolous argument or argues a meritorious claim for the purpose of harassing an opponent." *Id.*

IV. Discussion

This matter arises from Smith's repeated and unsuccessful efforts to challenge the FAA's authority to revoke or suspend pilots' air transportation certificates for safety violations. This Court's first opportunity to address Smith's theory was in *Mace*

v Skinner, CIV 96-676-TUC-RMB (D.Ariz. 1992).[1] In deciding *Mace,* the Court discussed **[Page 6]** the substantial unfavorable case law generated by Smith's litigation efforts against the FAA, the National Transportation Safety Board (NTSB) and the Department of Transportation (DOT). In granting the *Mace* defendants' motion to dismiss, the Court imposed a sanction in the form of an injunction against Smith for filing a frivolous lawsuit. The Court ordered Smith to seek prior permission from the Court before filing any future claims against the FAA. See *Mace v. Skinner*, CIV 91-676-TUC RMB (D.Ariz. June 6, 1995) (Order granting Defendants' motion to dismiss). The Order held that "[a]ny attempted violation of this Order shall subject Smith to the contempt powers of this Court." *Id.*

Before a court may engage in any fee-shifting sanctions under § 1927, it must find that "the attorney acted recklessly or in bad faith. Smith criticizes each decision made by those courts, as well as the unfavorable decisions made in his own cases of *Komjathy, Tearney, Rochna, Dilley* and *Foster*. He attacks the faulty reasoning of these prior decisions and derides the courts for their superficial analyses of his theory. Smith lays the majority of the blame with the unethical government lawyers who have intentionally misled the courts. Smith accuses the FAA, and Peter Lynch in particular, of a twenty year cover-up to perpetuate an intentional deception **[Page 7]** on the courts. Smith urges the Court to study his law review article, *FAA Punitive Certificate Sanctions: The Emperor*

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1 Initially, this Court dismissed Mace based on a finding of lack of subject matter jurisdiction. On appeal, the Ninth Circuit held the Court had jurisdiction to the extent the complaint challenged allegedly unconstitutional practices and procedures. *Scc Macc v. Skinncr,* 34 P.3d 854 (9th Cir. 1994). That decision represents Smith's only victory. The Ninth Circuit specifically noted, however, that:

> [i]n reaching this conclusion, however, we do not mean to imply that Mace's complaint may not be subject to dismissal under Fed. R. Civ. P. 12(b)(6), nor that, after development of the record, it may not be a candidate for summary judgment under Fed. R. Civ. P. 56(c). at 860.

Wears No Clothes; Or, How Do You Punish a Propeller?, 14 Transp. L.J. 59 (1985) which definitely sets forth the bases of Smith's theory.

A. Smith's Professional misconduct

In 1993, Rule 11 was amended to establish an objective standard intended to eliminate the "empty-head pure-heart" justification for patently frivolous arguments. See Fed. R. Civ. P. 11 cmt. (1993). Rule 11, as amended, renders the rule more favorable to the party against whom sanctions are being sought. *Warren v. Guelker*, 29 F.3d 1386, 1389 n.1 (9th Cir. 1994). The comments to the rule suggest some of the factors a Court may consider when deciding whether to impose sanctions:

> (1) whether the improper conduct was willful, or negligent;
> (2) whether it was part of a pattern of activity, or an isolated event;
> (3) whether it infected the entire pleading, or only one particular count or defense;
> (4) whether the person has engaged in similar conduct in other litigation;
> (5) whether it was intended to injure;
> (6) what effect it had on the litigation process in time or expenses;
> (7) whether the responsible person is trained in the law;
> (8) what amount, given the financial resources of the responsible person, is needed to deter that person from repetition in the same case; and
> (9) what amount is needed to deter similar activity by other litigants.

Fed. R. Civ. P. 11 cmt. (1993). Defendants argue that Smith's conduct implicates each of these factors. The Court agrees.

Smith has tenaciously attempted to convince the courts that the legislative history of the Air Commerce Act of 1926 proves his theory. According to Smith, Congress intended civil money penalties with a right to a jury trial as the sole **[Page 8]** enforcement mechanism for safety violations, rather than the

current administrative procedure. Smith argues that there is "no language in Section 609 that so much as hints at a connection between the commission of a safety violation and suspension or revocation of a pilot's license." (Complaint, ¶ 21). As set forth below, the Courts have consistently disagreed with him.

Pursuant to 49 U.S.C. § 44709 (1994), previously codified as Section 609(a) of the 7 Federal Aviation Act of 1958, as amended, 49 U.S.C. § 1429(a) (1992)), the Administrator may:

> issue an order amending, modifying, suspending, or revoking . . . any part of a certificate issued under this chapter if . . . the Administrator decides after conducting a reinspection, reexamination, or other investigation that safety in air commerce or air transportatton and the public safety requires that action . . . .

49 U.S.C. § 44709(b)(1)(A) (1994). The implementing regulation of this section provides in relevant part:

> if as a result of such reinspection, reexamination, or other investigation made by the Administrator under section 609 of the FA Act, the Administrator determines that the public interest and safety in air commerce requires, the Administrator may issue an order amending, suspending, or revoking all or part of any . . . airman certificate. . . .

14 C.F.R. § 13.19 (1995). The Ninth Circuit has consistently upheld this law as constitutional and permissible authority for the FAA to rely upon when it suspends or revokes air certificates under its current system. *See Foster v. Skinner*, 70 F.3d 1084 (9th Cir. 1995); *Roundtree v. United States*, 40 F.3d 1036 (9th Cir. 1994); *Go Leasing' Inc. National Transp Safety Bd.*, 800 F.2d 1514 (9th Cir. 1986). Other courts of appeals have agreed. *See Dilly v. National Transp. Safety Bd.*, 49 F.3d 667 (10 Cir. 1995); *Knipe v. Skinner*, 999 F.2d 708 (2d Cir. 1993); *Hite v. National Transp. Safety Bd.*, 991 F.2d 17 (1st Cir. 24 1993); *Rochna v. National Transp. Safety Bd.*, 929 F.2d

13 (1st Cir.), *cert. denied*, 502 U.S. 910 (1991); *Hill v. National Transp. Safety Bd.*, 886 F.2d 1275 (lOth Cir. 1989); *Tearney v. National Transp. Safety Bd.*, 868 F.2d 1451 (5th Cir.), *cert. denied*, 493 U.S. 937 (1989); **[Page 9]** *Komjathy v. National Transp. Safety Bd.*, 832 F.2d 1294 D.C. Cir. 1987), *cert denied*, 486 U.S. 1057 (1988).

In his response to Defendants' motion to dismiss, Smith attempts to distinguish these cases from Frye by arguing that those courts were never presented with Frye's particular claim that the FAA's procedures constitute an impermissible "executive branch created penalty." Smith knows that this is an inaccurate statement of law and fact.

Smith's "executive branch creation" claim was specifically argued and rejected by this Court in its June 6, 1995 opinion in *Mace*, slip op. 8-9 (D.Ariz. June 6, 1995) (Plaintiff asserts that [the] FAA revocation policy is an illegal executive branch-created penalty."). Similarly, The Honorable Carl A. Muecke in *Foster v. Skinner*, CIV 92-557 PHX-CAM (D.Ariz. 1993) considered the issue and rejected it.[2] In dismissing the **[Page**

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3 Specifically, paragraph 35 of the *Foster* complaint authored by Smith states:

First Cause of Action

35. The suspension or revocation of pilot, mechanic or operating certificate by the FAA as a penalty or sanction for the violation of one or more FARs has never been authorized by law. Only Congress may constitutionally create penalties, sanctions, or benefits, that is, it may not delegate its Article I, Section I, legislative authority to any other branch of the government. The use of certificate suspension and revocations as penalties is now and always has been, since the federal government first initiated regulation of aviation through the Air Commerce Act of 1926, a creation of the executive branch, not Congress.

Foster Complaint, at ¶ 35, March 25, 1992. The *Mace* Complaint states:

First Cause of Action

32. The suspension or revocation of pilot, mechanic or operating certificate by the FAA as a penalty or sanction for the violation of one or more FARs has never been authorized by law. Only Congress

(continued...)

10] complaint, Judge Muecke imposed Rule 11 sanctions against Smith because Smith "personally knew-based on his

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[2](...continued)

may constitutionally create penalties, sanctions, or benefits, that is, it may not delegate its Article I, Section I, legislative authority to any other branch of the government. The use of certificate suspensions and revocations as penalties is now and always has been, since the federal government first initiated regulation of aviation through the Air Commerce Act of 1926, a creation of the executive branch, not Congress.

Mace, Complaint, (emphasis added). *Foster* and *Mace* are virtually identical. Now, compare *Foster* and *Mace* to the *Frye* complaint:

First Cause of Action

20. The FAA's claim of authority to punish an airman for the alleged violation of a safety regulation by suspending his pilot's license is based on Section 609 of the Federal Aviation Act of 1958 (FA Act), as amended. The contention is that certain language in that section authorizes the FAA Administrator to suspend or revoke certificates anytime he deems 'that safety in air commerce or air transportation and the public interest requires.'

21. Based upon this vague language federal aviation officials decided that is was in the interest of air safety to impose suspensions and revocations on certificate holders as punishment for safety violations-obviously figuring that no one could argue with the logic of that. This, even though no language is contained in Section 609 that so much as hints at a connection between the commission of a safety violation and suspension or revocation of a pilot's license, or any other certificate; no words, such as "regulation," "violation, sanction," or "penalty."

22. Thus based on these officials' own statutory interpretation, logic dictates that the executive branch of the federal government, not Congress, created certificate penalties. It is fundamental under Article I, S l, of the Constitution that only the legislative branch of the federal government, not the executive, may create penalties, or benefits, i.e. food stamps. Thus the imposition upon Capt. Frye of a suspension of his pilot's license as a penalty for alleged air-safety [sic] violations violated his Fifth Amendment right to due process.

Frye Complaint at ¶¶ 20-22. Clearly, Frye raises the very claim rejected in *Mace*, and *Foster*.

losses in the Ninth Circuit and in other courts of appeals-knew that [ten of the thirteen claims] were not grounded in law." The Ninth Circuit affirmed Judge Muecke's decisions. *See Foster*, 70 F.3d at 1089.

As to Smith's second claim regarding publication in the Federal Register, it has also been resoundingly rejected by the courts including this one. It is firmly established that the APA does not require publication of the FAA's policy to suspend or revoke certificates as a method of imposing sanctions for violations of FARs. Indeed, the Court's research has discovered no less than eleven district court cases and six circuit decisions where Smith raised the two claims presented today. *See Clark v. Busey*, 959 **[Page 11]** F.2d 808 (9th Cir. 1992); *Rochna v. National Transp. Safety Bd.*, 929 F.2d 13 (1st Cir. 1991); *Tearney v. National Transportation Safety Board*, 868 P.2d 1451 (5th Cir.), *cert. denied*, 493 U.S. 937 (1989); *Komjathy v. National Transp. Safety Bd.*, 800 F.2d 1514 (D.C. Cir. 1986); *Go Leasing Inc. v. National Transp. Safety Bd.*, 800 F.2d 1514 (9th Cir. 1986); *Foster v. Skinner*, 70 P.3d 1084 (9th Cir. 1995); *Foster v. Skinner*, CIV 92-557-PHX-CAM (D.Ariz. 1993); *Mace v. Skinner*, CIV 91-676-TUC-RMB (D.Ariz. 1992); *Roundtree v. Skinner*, A91-566-CIV-JKS (D.Alaska 1993), *aff'd*, 40 P.3d 1036 (9th Cir. 1994)(unpublished table decision); *Roundtree v. U.S.A.*, J92-029 CIV (D.Alaska 1992); *Bellows v. United States*, CV-92-00030-JWS (D.Alaska 1993), *aff'd*, 42 F.3d 1398, 1994 WL 658999 (9th Cir. 1994) (unpublished table decision); *Bellows v. Skinner*, A91 11 565 CIV (D.Alaska 1993), *aff'd*, 28 P.3d 104, 1994 WL 283738 (9th Cir. 1994)(unpublished table decision); *Knipe v. Skinner*, 91-CV-1338-TJM (N.D.N.Y. 1991); *Knipe v. United States*, 92-CV-1389-TJM-DNH (N.D.N.Y. 1993); *Dilley v. United States*, 92-NC-120W (D.Utah 1993), *aff'd*, 16 F.3d 415 (10th Cir. 1994); *Dilley v. Skinner*, 91-NC119W (D.Utah 1991); *Mace v. United States*, 92-750-TUC-WDB (D.Ariz. 1993), *aff'd*, 42 F.3d 1400 (9th Cir. 1994) (unpublished table decision). Smith brought these suits either as a direct appeal from the agency administrative hearings or under the Federal Tort Claims Act or

as Bivens actions. Smith continues to assert this claim even though he is all too aware of settled case law to the contrary.

Smith has shown his contempt for this Court. He averred to the Court that Capt. Frye's claims were distinguishable from *Mace v. Skinner*, CIV 91-676-TUC-RMB. In *Mace*, the plaintiffs aircraft mechanic license was revoked for violations of the FARs. *Mace* set forth the case law in detail recognizing the authority and the constitutional
soundness of the FAA's authority to impose a revocation or suspension as a sanction. *Mace*, slip op. at 8-10 (June 6, 1995). That decision also cited the circuit cases which found that the APA did not require publication in the Federal Register or the Code of **[Page 12]** Federal Regulations. Id at 11. In granting defendants' motion to dismiss, the Court believed an injunction against filing future lawsuits of this sort would deter Smith. *Id* at 14. It did not.

Smith ignored that Order and never formally sought permission to file the present case. Smith apologizes for this "oversight" by explaining that he was so tired mentally and physically that when he received the *Mace* decision, he "just skimmed the order, and later tossed it in a file box which wound up in [his] storage shed." Response at 2 n.2. He contends that he "honestly believed that the order had simply prohibited filing any further proceedings in *Mace*." *Id.* Even if the Court were to find this conduct merely reckless, which it does not, there is no excuse.

At a January 28, 1997 hearing, the Court specifically asked Smith to distinguish Mace. Smith assured the Court that:

> Well, Mace against Skinner, number one, it's untrue that Your Honor said I couldn't bring anymore such suits. It's just in that case that you ordered the clerk not to accept anymore pleadings. Anyway by that time I was worn out anyway and didn t appeal it.
>
> But the point - there's an absolute difference. One, you might go through Mace against Skinner and say - I don't remember specifically. That was an emergency revocation

case. It raised a lot of different issues.

Transcript of January 28, 1997 at 8:16-24. At a minimum given the Court's concern, Smith should have reviewed *Mace* and corrected the record. These facts suggest strongly that Smith was not concerned with candor to the Court. First, Smith knew Frye's claims were identical to the issues raised, and rejected, in *Mace* and *Foster*. He was also driven by his desire to have Defendants answer his Request for Admissions. The Court concludes that Smith's representations on January 28, 1997 were intentional misstatements designed to mislead the Court in order to further his personal agenda. In doing so, Smith violated ER 3.3(a)(1).

According to Smith, no court has adequately addressed his "executive branch" creation argument. At hearing, Smith criticized the *Mace* decision as wanting in logic **[Page 13]** and analyses. He contends that this provides the basis for finding that his theory is a nonfrivolous argument for the reversal of law. The Court finds this contention without merit. **The Frye claims have been repeatedly rejected** [emphasis added] and do not constitute a good faith argument for the reversal of the law in this area. Rather, **the fine distinctions that Smith contends are self-evident, are utterly implausible and nothing more than semantic double-talk. [Emphasis added]** Smith brings essentially the same claims repeatedly in the face of **contrary case law**. Indeed, Smith admits that "Mace was one of eleven lawsuits, all in the same vein (some involving the FAA emergency power, like *Mace*), six *Bivens* constitutional rights violations cases, and five Federal Tort Claims Act cases paralleling them." Response at 2 n.2. *Mace, Foster, Mace, Roundtree, Rochna, Tearney, Komjathy, Go-Leasing, Knipe and Dilley* resoundingly establish by clearing and convincing evidence that Smith knew his legal arguments in this case were unwarranted by existing law. He knew that they could not be considered a "nonfrivolous argument for the extension, modification, or reversal of existing law" under Fed. R. Civ. P.11(b)(2).

His repeated attempts to prosecute his claims has been at considerable cost to the taxpayers of this Nation in terms of time and effort expended by government officials, lawyers and judges. **The public's confidence in the system has been undermined by his persistent efforts**. The clients who have put their faith in Smith, have found themselves liable for the costs of frivolous litigation. There comes a point when persistence becomes an obstruction. The Court holds that Smith has engaged in professional misconduct falling below that which is expected of lawyers practicing in this District. Smith's repetitive prosecution of baseless claims is evidence that he rejects any view but his own, including the federal courts to which he owes an ethical obligation. As such, Smith has violated ER 3.1. **[Page 14]**

B *What Sanctions Are Appropriate*

When determining an appropriate sanction, ABA Standard 3.0 suggests courts consider: (1) the duty violated; (2) the lawyer's mental state; (3) the actual or potential injury caused by the lawyer's conduct; and (4) the existence of aggravating and mitigating factors. See ABA Standards For Imposing Lawyer Sanctions 3.0 (1986). Here, Smith violated his ethical duty to this Court, opposing counsel and his client. The Court lacks the expertise to question Smith's mental state. The expense of his lawsuits is well-documented. **One mitigating factor is Smith's respectful demeanor at hearings.** [Emphasis added.] This does not excuse his conduct, however. Therefore, the Court shall consider whether it is appropriate to impose Defendants' attorneys fees and costs as a 11 sanction.

1. Defendants' Attorneys' Fees and Costs

Before a court can impose an opponent's attorneys' fees and nontaxable costs, under 28 U.S.C. § 1927, it must find bad faith. That is, that the lawyer "knowingly or reckless raise[d] a frivolous argument or argue[d] a meritorious claim for the purpose of harassing an opponent." *Keegan*, 78 F.3d at 436. Those elements are present here. Filing successive complaints **which Smith knows are frivolous** is sufficient evidence of his bad faith intent to injure the FAA, the NTSB and their

employees. *Buster*, 104 F.3d at 1190 ("[S]uccessive complaints based upon **propositions of law previously rejected** may constitute harassment under Rule 11."). *Foster, Mace* and *Frye* and the twelve other district court cases cited above provide sufficient **evidence of his malicious intent**.

Smith's brief also provides concrete evidence of his bad faith intent. In 1967-68, 24 Smith worked as a staff lawyer with the Office of General Counsel of the FAA. He was discharged for failure to satisfactorily complete the probationary period. Response at 13. In Smith's words:

> They canned me on grounds I'd flunked my one-year civil service probationary period. They said I didn't meet the standards required of any government lawyer. I agreed with them wholeheartedly: I couldn't possibly live down to the professional standards they reflected.

Id. Smith goes on to discuss the agency lawyers:

> I bring this [discharge] out in the open for a reason. Not that it excuses the way Justice Department lawyers have handled these cases, which will be explored below, but to underscore the fact there is little doubt Peter Lynch and others, for motivational reasons persuade Justice lawyers I'm doing all this as sour grapes or retaliation. which is utter nonsense. My motivation is just what I've said, what FAA lawyers like Peter Lynch are doing, is the greatest abuse of power in the history of the federal bureaucracy.

Id. Smith is referring to Peter J. Lynch who is attorney with the FAA. Lynch was also opposing counsel in Smith's *Go Leasing, Komjathy, Canfield,*[3] and *Hite* cases. Smith later named Lynch as a defendant in Knipe, Bellows, Mace and Dilley. Today, Smith accuses Lynch of an "unprofessional, unethical, a

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4 See *Canfield Aviation, Inc. v. National Transp. Safety Bd.*, 854 F.2d 745 (5th Cir. 1988).

carefully calculated ploy to mislead the appeals court." Response at 34. Smith elaborates, "*Dilley* is of vital interest here because it demonstrates how desperate Lynch was-and-is-to gull courts into believing any petition for review was just another attack by Don Quixote Smith." *Id.* Smith speculates, without substantiation, that FAA attorney Harry Gold who worked on the *Dilley* appellate brief left public service because Gold did not want to be a party to Lynch's deceit. Smith speculates: "[as a] fine young, bright and ethical man, I have not the slightest doubt that having to put his name to a brief which [Gold] knew to be a brew of misleading argument, if not downright lying was the precipitating factor in his action. Response at 35 n.29.

Smith does not limit his accusations of dishonesty to Lynch. He contends Neil R. Eisner, Assistant General Counsel of the Department of Transportation, (Response at 15); Robert Doehl, attorney, U.S. Department of Justice, (Response at 3); Wendy L. Rome, attorney, U.S. Department of Justice, (Response at 13 n.11); Karen Bury, **[Page 16]** FAA attorney, (Response at 56-57); and John Cassady, Deputy Chief Counsel, FAA (Response at 58) are willing participants in this conspiracy to mislead the Courts.[4] Such conclusory attacks on these attorneys is unconscionable and provides further proof that Smith is bent on using the legal system to **maliciously harass these individuals.**

This Court is not the first court to identify Smith's vendetta against the FAA. As the Second Circuit recognized "the district court's conclusion that Smith appears to be 'pursuing a personal agenda against the FAA' is supported by the record. *Knipe*, 19 F.3d at 77. In upholding the district court's imposition of sanctions, the Ninth Circuit found the following factors significant:

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5 Eisner was a defendant in *Foster, Mace, Bellows* and *Knipe*. Doehl and Rome were opposing counsel in *Roundtree* and *Knipe*. Bury was opposing counsel in *Tearney* and *Canfield*. Cassady was a defendant in Mace, *Bellows* and *Knipe*.

> First, Mr. Smith declined to challenge any aspect of the sanctions. Second the district court thoroughly examined Smiths litigious history, and stated that Smith filed a frivolous complaint which contained at least ten claims that he personally knew-based on his loses [sic] in the Ninth Circuit and in other courts of appeals-were not well-grounded in law. Third, Smith's relentless pursuit has imposed significant litigation costs on Defendants; thus, inflicting further expense and delay upon Defendants would not be just.

Foster, 70 F.3d at 1088.

Based on the foregoing, the Court holds that this frivolous suit was brought in bad faith and solely for the purpose of harassment in violation of Rule 11 and U.S.C. 1927. A proper sanction is to impose opposing counsel's attorneys' fees and travel expenses. Accordingly, pursuant to 28 U.S.C. § 1927, Smith shall be liable for the attorneys' fees and travel costs incurred by the Justice Department lawyers in this case.

Attorney Lucinda A. Love expended 275 hours at S93.55 per hour for a total of $25,726.25. Attorney Sandra M. Schraibman expended 42.75 hours at S113.34 per hour for a total of $4,845.29. Attorney Robert P. Vente, a trial attorney with the FAA expended 85.5 hours at $35.06 for a total of $2,997.63. In addition, the Department of **[Page 17]** Justice incurred travel costs of $578.51 for Attorney Love's appearance at the motion to dismiss hearing. The total costs to the Justice Department and/or FAA to defend this case, not including Love's oral argument or travel expenses relating to this issue are $34,117.68.

Smith contends that these fees are unreasonable. He points to his other cases where the sanctions imposed were much smaller. The Court is unsympathetic. **Smith did not dismiss this action when he had the opportunity to do so.** Instead, he posted the $20,000 bond and needlessly multiplied the proceedings at the expense of Defendants and the Court. The Court warned Smith that by posting the bond,he risked

sanctions and a state bar complaint. *See* Order of February 21, 1997. Smith accepted that risk. **His Request for Admissions included 106 admissions with subparts.** Defendants were also required to review over 200 pages of documents to confirm or deny whether they were genuine. Smith cannot be surprised by the amount of fees incurred herein. Based on the circumstances of this case and the factors set forth in *Kerr v. Screen Extras Guild, Inc.*, 526 F.2d 67, 70 (9th Cir. 1975), *cert. denied*, 425 U.S. 951 (1976), the Court finds that the **Defendants fees and costs reasonable.**

2. Disbarment From Federal Court

Local Rule 1.6 provides in relevant part:

> (a) Any member of the bar of the Court may be disbarred or otherwise disciplined after such hearing as the Court may in each particular instance direct.

Rules of Practice of the United States District Court for the District of Arizona, Rule 1.6(a) (1994). Any sanctions imposed under Rule 11 is "limited to what is sufficient to deter repetition of such conduct . . . ." Fed. R. Civ. P.11(c)(2). Rule 11 is "aimed at curbing abuses of the judicial system." *Business Guides v. Chromatic Communications*, 498 U.S. 533, 542, 111 S.Ct. 922, 929, 112 L.Ed.2d 1140 (1991) (citing *Cooter & Gell v. Harmarx Corp.*, 496 U.S. 384, 397 (1990)). Relying on Rule 11, district courts and **[Page 18]** courts of appeal have sanctioned Smith personally without effect.[5] For instance, in

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6 *See Foster*, CIV 92-557-PHX-CAM (D.Ariz. October 14, 1993)(imposing S14,704), *aff'd* 70 F.3d 1084 (9th Cir 1995); *Bellows v. Skinner*, 69 F.3d. 543, 1995 WL 635174 (9th Cir. 1995) (unpublished decision affirming sanction of S6,250) and *Bellows v. Skinner*, 48 F.3d 1231 (unpublished decision remanding district court's sanctions against Smith S2,490.71 for consideration under the emended version of Rule 11); *Roundtree*, J92-429CIV (imposing a S4,976.24 sanction), *aff'd* 40 F.3d at 1040; *Knipe v. Skinner*, 91-CIV-1338 (N.D.N.Y. October 23, 1992), *aff'd* 99 F.2d 708 (2d Cir. 1993) (imposing a S9,000 sanction);

(continued...)

Bellows, Judge James K. Singleton observes:

> I do not know if Smith is mentally ill, a vexatious litigant, or simply a modern day Don Quixote tilting at windmills. It doesn't matter. It is clear that Smith is bringing these frivolous lawsuits solely for the purpose of multiplying litigation and harassing his opponents. Such conduct warrants sanctions.

Bellows, 69 P.3d at 543, 1995 WL at *1. The Tenth Circuit Court of Appeals admonished Smith in *Dilley*, that "[f]urther litigation on these or related theories may subject Mr. Smith to possible sanctions." *Dilley*, 49 F.3d at 670. The Second Circuit Court of Appeals found Smith's appeal frivolous and ordered that he show cause why he should not be assessed double costs and fees. *Knipe v. Skinner*, 999 F.2d 708 at 710. And the First Circuit's classic quote:

> in Tearney Komjathy and Go Leasing, the various petitioners were represented by the selfsame attorney who represents the petitioners in this case. Persistence can be a virtue, but, to paraphrase Emerson, a foolish persistency is the hobgoblin of little minds. We agree with the FAA that Rochna's attorney remains "oblivious to the obvious."

Rochna, 929 F.2d at 13. In referring to Smith's theory outlined in his law review article, the Ninth Circuit recognized:

> Once he embraced that idea, he climbed upon a hobbyhorse from which nothing has dislodged him. We can agree with the famous author who wrote, "So long as a man rides his Hobby-Horse peaceably and quietly I along the King s highway, and neither compels you or me to get up I behind

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[5](...continued)

Knipe v. United States, 92-CV-1389 (N.D. N.Y. Apr. 12 1993) (imposing S7,252.89 sanction), 19 F.3d 72 (2d Cir. 1994) (affirming the imposition of sanctions); *Mace*, CIV 91-676-TUC-RMB, slip op. 8-9 (D. Ariz. June 6, 1995) (imposing an injunction against future similar filings).

him . . . what have either you or I to do with it?" Laurence Sterne, Tristram Shandy 13 (Modern Library 1950).

Unfortunately, Smith does compel others to "get up behind him." He has brought his theory to court time after time and has been told that he is wrong. For instance, in *Bellows*, Judge James K. Singleton observes:

I do not know if Smith is mentally ill, a vexatious litigant, or simply a modern day Don Quixote tilting at windmills. It doesn't matter. It is clear that Smith is bringing these frivolous lawsuits solely for the purpose of multiplying litigation and harassing his opponents. Such conduct warrants sanctions.

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Roundtree, 40 F.3d at 1036. *Roundtree* further observes:

Plainly put, the complaint was patently frivolous. Moreover, it is one of multiple complaints brought against the government and based upon the self-same theories. To be sure, this is not a case where the same plaintiff has sued

> over and over again, but that is a distinction without a difference. It is of an almost worst stripe because a lawyer has been able to beguile plaintiff after plaintiff into coming along with him as he rides his hobbyhorse against the government.

Id. (internal citations omitted).

Frye represents the last chapter in the Smith saga of frivolous lawsuits against the FAA, NTSB or DOT. The ride has come to an end, at least in this District. **Timothy Frye is the last client to be induced to ride double on Smith's futile charge** against these agencies. Sanctions, monetary or otherwise, do not deter Smith from filing frivolous claims on behalf of clients who rely on his expertise as a member in good standing with the federal bar. Under the circumstances, disbarment from the practice of law in this District is mandated.

The Court does not issue this disbarment lightly. Serious misconduct warrants serious measures. Consequently, and based on the inherent power of the Court, Lawrence B. Smith shall no longer be allowed to practice law in the United States District of Arizona until he can satisfy the judges of this District of his fitness to practice law. The State Bar of Arizona shall be provided a copy of this Order for whatever disposition it deems appropriate.

V. Conclusion

Based on the foregoing,

IT IS ORDERED that:

(1) Lawrence B. Smith is herewith disbarred from the practice of law in the 26 federal courts of the District of Arizona; pursuant to 28 U.S.C. § 1927,

(2) Defendants are awarded reasonable attorneys' fees in the amount of $34,117.68 and travel costs in the amount of $578.51;

(3) the $20,000.00 bond is hereby forfeited to Defendants as partial payment for assessed fees and costs; the Clerk of the Court shall release the bond to the Defendants;

(4) the Clerk of the Court provide a copy of this Order to

the Disciplinary Commission of the State Bar of Arizona for whatever disposition it deems appropriate.

DATED this 2nd day of October, 1997

Richard M. Bilby

Senior United States District Judge

FILED MAY 20, 1997

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

TIMOTHY P. FRYE, Plaintiff,

vs.

FREDERICO PENA, Secretary Department of Transportation, et al., Defendants.

NO. CIV 97-10 TUC RMB

ORDER

Introduction

Plaintiff Timothy P. Frye's air transport pilot certificate was suspended 90 days when he repossessed a B-747 [sic] aircraft which was later found to be unairworthy. He claims that the suspension prevents him from obtaining employment with a commercial airline. He brings suit against Frederico Pena, Secretary, Department of Transportation; Linda H. Daschle, Acting Administrator, Federal Aviation Administration (FAA); Nicholas G. Garaufis, Chief Counsel, Federal Aviation Administration; Loretta Alkalay, Assistant Chief Counsel, Eastern Region, FAA; and the National Transportation Safety Board.

On January 6, 1997, Frye, through counsel Gary S. Grynkewich, Edward S. Coleman and Lawrence B. Smith, filed suit and a motion for preliminary injunction with regard to his suspension. Frye claims that his Fifth Amendment due process rights and the Administrative Procedures Act were violated when (1) the Federal Aviation Administration ("FAA") relied on Section 609 of the Federal Aviation Act of 1958, 49 U.S.C. § 44709 (1994) to suspend his license when there is "no language in Section 609 that so much as hints at a connection

between the commission of a safety violation and suspension or revocation of a pilot's license," (Complaint, ¶ 21); and (2) **[Page 2]** the FAA failed to provide notice through publication of a rule of its policy to impose suspensions and revocations as a penalty for violation of air safety rules. (Complaint, ¶ 23).

With the motion for preliminary injunction, Frye sought permission to conduct discovery by having Defendants complete a Request for Admissions. The Court's initial review of the case questioned whether these claims had a basis in law arising from its grave concern that the legal issues been previously resolved by appellate courts nationwide, including the Ninth Circuit Court of Appeals. Before allowing the requested discovery, this Court warned Plaintiff's three attorneys of their ethical obligation under ER 3.1 and that if the claims were later found to be identical to claims consistently rejected by the Ninth Circuit, counsel risked sanctions and a State Bar complaint. The Court ordered counsel to re-evaluate the case in light of prior circuit law and required them to post a $20,000 bond if they decided to proceed with this suit. See Order of February 21, 1997.

Consequently, attorney Gary S. Grynkewich **[Page 3]** filed a motion to withdraw from this case stating that he "took steps toward having the action dismissed, however Larry Smith refused to join in said stipulation." See Motion to Withdraw as Counsel of Record at 1. The Court subsequently granted Grynkewich's motion. *See Frye v. Pena*, No. CIV 97-10-TUC-RMB (D.Ariz. Mar. 28, 1997). On March 25, 1997, Plaintiff Frye also stipulated to withdrawal of attorneys Grynkewich and Edward S. Coleman.

Smith, Frye's remaining counsel, posted the required bond and submitted a Request for Admissions to the Defendants. The Court desirous of having the issues settled on a complete record, ordered the Defendants over their objection, to respond to Smith's Admissions. Defendants diligently completed the voluminous Request which included 106 admissions with subparts. They also reviewed over 200 pages of documents to confirm or to deny whether the documents were "genuine."

Plaintiff **[Page 2]** filed a motion seeking to have admissions nos. 4 and 11 deemed admitted because he feels they were not answered to his satisfaction and were but another example "of smoke and mirrors and red-herrings" that plaintiff's counsel has encountered previously. That motion is meritless and is denied.

Smith also filed a motion for sanctions on the basis that he gave Defendants the opportunity to withdraw their motion to dismiss and they failed to do so. That Motion is also meritless and is denied.

Before the Court today is Defendants' motion to dismiss. Defendants first contend that the Court lacks subject matter jurisdiction since there is no final agency decision below. Defendants also assert that the Complaint raises claims that are substantially identical to claims unsuccessfully pursued by Frye's counsel, Lawrence Smith. in numerous prior lawsuits. Frye through Smith opposes the Motion.

Background

Frye holds an airline transport pilot's certificate which entitles him to carry passengers or cargo for hire. On October 7, 1995, Frye with a co-pilot repossessed a Boeing B-737 aircraft from the Pittsburgh International Airport and flew it to Tucson, Arizona.

On February 16, 1996, the FFA [sic] notified Frye by mail that it proposed to suspend his pilot's certificate for a period of 180 days for violating certain FAA regulations. On September 17, 1996, an informal conference was held between Frye and the FAA. The FAA subsequently, dismissed several charges against Frye and reduced the proposed sanction from 180 to 90 days. On October 18, 1996, the FAA issued an order suspending Frye's commercial pilot certificate for a period of 90 days The suspension order charged that Frye had violated a number of FAA regulations ("FARs") by operating an unworthy aircraft and by operating an aircraft in a careless or reckless manner when he piloted the Boeing B-737 from Pennsylvania to Arizona.

[Page 4] According to the Order of Suspension, the FAA Administrator determined that both public interest and safety in

air commerce required the suspension of Frye's commercial pilot certificate.

Frye appealed the decision with the National Transportation Safety Board ("NTSB") on November 4, 1996. The filing of such an appeal stays the Order of Suspension during the pendency of the appeal. To date, no hearing has been set in that appeal. Consequently, Frye continues to be able to fly under authority of his pilot's certificate. Frye is presently flying a Boeing B-727 for a private individual in Riyadh, Saudi Arabia.

Subject Matter Jurisdiction

Defendants argue that this Complaint is nothing more than an attempt to preclude agency determination on the merits of the FAA action in this case. Frye contends he is properly asserting constitutional challenges to the FAA's authority. Both parties are correct.

Frye's prayer for relief is a declaration that his constitutional rights have been violated. He seeks a preliminary and permanent injunction enjoining defendants from pursuing the present certificate action against him. Complaint at 5. Frye also seeks "such other and further relief as the Court may deem just and equitable." Id. at 6.

The Court finds that the Complaint asserts broad constitutional challenges that are not inextricably intertwined with a review of the merits of the FAA's action in this case. *Foster v. Skinner*, 70 F.3d 1084, 1087 (9th Cir. 1997). If the Court were to agree with Frye, it is possible that the Court might find it " just" to award monetary damages. Thus, the Court concludes it has subject matter jurisdiction to address the constitutional issues.

Frye also seeks this Court to enjoin the FAA from suspending his pilot's certificate. This the district court cannot address. 49 U.S.C. § 46110(a) vests exclusive **[Page 5]** jurisdiction in the courts of appeals to review claims regarding final agency actions by the FAA. Here, there is no final agency decision as Frye is in the process of pursuing his administrative remedies. Accordingly, the claim is not ripe for review, and if it was, it must be appealed to the Ninth Circuit Court of

Appeals. Accordingly, the motion for preliminary injunction shall be dismissed for lack of subject matter jurisdiction.

The Constitutional Challenges

Although this Complaint is brought on behalf of a plaintiff who had his pilot's certificate suspended, it is being prosecuted by Lawrence B. Smith, a lawyer who has brought numerous similar cases against the FAA officials. In fact, Smith has made his own adverse law in this area. *See Foster v. Skinner*, 70 F.3d at 1086.

A review of the Complaint establishes that this case raises identical arguments previously litigated unsuccessfully by Smith in other cases. This case, and prior Smith litigation, has been costly in terms of reliance by clients and time expended by public officials, government attorneys and the federal courts. This Court warned Smith of the possible ramifications of pursuing identical claims which had been resolved against Smith's clients in prior cases. For the reasons set forth below, the Court is left with no option but to issue an order to show cause why Smith should not be sanctioned for violation of Fed. R. Civ. P. 11(b)(1) and (2) and Ethical Rules 3.1 and 3.3(a)(1), 28 U.S.C. § 1927 and this Court's February 21, 1997 Order.

A. Claim One: The Executive Branch Illegally Created License Penalties

Smith argues that the FAA officials' contention that they can impose certificate penalties because it is in the public interest is an unconstitutional assertion of power. *See* Plaintiff's Response to Motion to Dismiss ("Response") at 7. According to Smith, the executive branch officials created punitive certificate sanctions by using license suspensions and revocations as a "penalty" for the violation of air safety regulations. This use of certificate actions, opines Smith, is based on the erroneous claim Congress **[Page6]** authorized the Administrator to suspend or revoke anytime he deems it to be in the interest of air safety and the public. Smith argues that there is no such authority so that in essence, the executive branch created license penalties. Smith contends that "neither the NTSB nor any court of appeals has ever addressed the

creation issue" and that "Congress may not delegate to an administrative agency (or anyone) its authority to create benefits or sanctions." *Id.* According to Smith, the executive branch officials created punitive certificate sanctions by using license suspensions and revocations as a "penalty" for the violation of air safety regulations. This use of certificate actions, opines Smith, is based on the erroneous claim Congress **[Page6]** authorized the Administrator to suspend or revoke anytime he deems it to be in the interest of air safety and the public. Smith argues that there is no such authority so that in essence, the executive branch created license penalties. Smith contends that "neither the NTSB nor any court of appeals has ever addressed the creation issue" and that "Congress may not delegate to an administrative agency (or anyone) its authority to create benefits or sanctions." *Id.*

In support of these arguments, Smith relies on the Administrative Procedure Act, which states in relevant part:

> (a) This section applies, according to the provisions thereof, to the exercise of a power of authority.
>
> (b) A sanction may not be imposed or a substantive rule or order issued except within jurisdiction delegated to the agency and as authorized by law.

5. U.S.C. § 558. Smith argues that section 609 does not "hint" at sanctions in the penalties and as such, the FAA is not "authorize by law" to impose the same on pilots by revoking their licenses for safety violations. Smith assert he "*does not*" challenge Defendants' claim under Sectionb 609." Response at 6 (emphasis in original). Rather, he contends that the Defendants have been successful in misdirecting the courts of appeals who have addressed this issue to section 609. According to Smith, the mistake began with *Wilson v. Civil Aeronautics Board*, 244 F.2d 773 (D.C. Cir. 1957). According to Smith, the government attorneys in *Wilson* argued in their responding brief that section 3(f) of the Air Commerce Act of 1926, not section 609 of the Civil Aeronautics Act of 1938, was

the source of the suspension and revocation power of violations. Because the *Wilson* defendants argued that ["t]here was no statutory specification of the grounds for revocation for suspension or revocation, this being a matter obviously left for the Secretary to establish" that the argument constitutes an admission by the executive of the source of authority to impose license penalties. According to Smith, [h]ere, was the government telling the court that 1938 had nothing to do with **[Page 7]** creating the system under attack because it started in 1926, authorized by the Air Commerce Act, not the Civil Aeronautics Act of 1938, which Section 609 is first found." Response at 6. Smith contends that the *Wilson* pilot's lawyers missed what the government attorneys were telling them, that the relevant time frame for congressional intent was in 1926, not 1938. *Id.* Because Defendants here admitted that the quote was accurate, it is evidence of the executive's [sic] branch's recognition of the true source of authority. *See* Admission No. 68. From this conclusion, argues Smith argues that Congress never intended to authorize federal officials to impose punitive certificate sanctions since section 3(f) of the 1926 Act contains no language about "public interest" or "air safety." Smith contends that there is no legislative history for either the 1938 Act of [sic] the 1958 Act that explains what purpose Congress had in mind for the "public interest and safety " language relied upon by the FAA and the courts of appeals.

The Court has reviewed these arguments and finds them frivolous. Defendants characterize them as "semantic games" and the Court agrees. Smith continues to ignore settled law in this circuit, as well as in other circuits which preclude the claims he continues to raise. It does not matter that the government attorneys made that argument in the 1950s, courts have interpreted later enactments as providing a *present* source of authority regarding suspensions or revocations.

Pursuant to 49 U.S.C. § 44709 (1994), previously codified as Section 609(a) of the Federal Aviation Act of 1958, as amended, 49 U.S.C. § 1429(a) (1992)), the Administrator may:

> issue an order amending, modifying, *suspending or revoking . . .* any part of a certificate issued under this chapter if . . . the Administrator decides after conducting a reinspection, reexamination, or other investigation that safety in air commerce or air transportation and the public safety requires that action . . .

49 U.S.C. § 44709(b)(1)(A)(1994) (emphasis added). The implementing regulation **[Page 8]** provides in relevant part:

> if as a result of such reinspection, reexamination, or other investigation made by the Administrator under section 609 of the FA Act, the Administrator determines that the *public interest and safety in air commerce requires it,* the Administrator may issue an order amending *suspending, or revoking all or part of any . . . airman certificate . . ..*

14 C.F.R. § 13.19 (1995)(emphasis added). The Ninth Circuit has consistently upheld this law as constitutional and permissible authority for the FAA to rely upon when it suspends or revokes air certificates. *See Foster v. Skinner, 70* F.3d 1084 (9th Cir. 1995); *Roundtree v. United States,* 40 F.3d 1036 (9th Cir. 1994);--Go *Leasing, Inc. v. National Transp.,* 800 F.2d 1514 (9th Cir. 1986). Similarly, other Courts of appeals interpreting these regulations have found the Act the FAA's procedures constitutional. *See Dilley v. National Transp. Safety Bd.,* 49 F.3d 667 (10 Cir. 1995); *Knipe v. Skinner,* 99 F.2d 708 (2d Cir. 1993); *Hite v. National Transp. Safety Bd.,* 991 F.2d 17 (1st Cir. 1993); *Rochna v. National Transp. Safety Bd.,* 929 F.2d 13 (1st Cir.), *cert. denied,* 112 S.Ct. 305 (1991); *Hill v. National Transp. Safety Bd.,* 886 F.2d 1275 (10 Cir. 1989); *Tearney v. National Transp. Safety Bd.,* 868 F.2d 1451 (5th Cir.), *cert. denied,* 493 U.S. 937 (1989); *Komjathy v. National Transp. Safety Bd.,* 832 F.2d 1294 (D.C. Cir. 1987), *cert. denied,* 486 U.S. 1057 (1988).

Smith's claim that this issue has never been presented to the courts by him are simply not true. The "executive branch creation" claim was specifically argued and rejected by this very

Court in its June 6, 1995 opinion in *Mace v. Skinner,* CIV 91-676TUC-RMB, slip op. 8-9 (D.Ariz. 1995) ("Plaintiff asserts that [the] FAA *revocation policy* is an illegal executive branch-created penalty.") Similarly, the Honorable Carl A. Muecke in *Foster v. Skinner,* CIV 92-557-PHX-CAM (D.Ariz. 1993) faced the same challenge in paragraph 35 of a Complaint authored by Smith:

> First Cause of Action
>
> 35. The suspension or revocation of pilot, mechanic or operating certificate by the FAA as a penalty or sanction for the violation of one **[Page 9]** or more FARs has never been authorized by law. Only Congress may constitutionally create penalties, sanctions, or benefits, that is, it may not delegate its Article I, Section I, legislative authority to any other branch of the government. The use of certificate suspension an revocations as penalties is now and always has been, since the federal government first initiated regulation of aviation through the Air Commerce Act of 1926, *a creation of the executive branch,* not Congress.

Foster Complaint, at 1 35, March 25, 1992 (emphasis added). Judge Muecke dismissed the Complaint and imposed Rule 11 sanctions on Smith because Smith "personally knew--based on his losses in the Ninth Circuit and in other courts of appeals--knew that [ten of the thirteen claims] were not grounded in law." The Ninth Circuit affirmed Judge Muecke's decisions. *See Foster,* 70 F.3d at 1089. Defendants point to not less than twelve district court cases and *two* circuit court cases where Smith has raised his "executive-created penalty" argument. *See* Defendants' Reply in Support of their Motion to Dismiss, p. 3 n.3. The Court's investigation has discovered fifteen district court cases and three circuit decisions where Smith raised the two claims presented today.[1]

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1 Those cases are: *Tearney v. National Transportation Safety Board,* 868 F.2d 1451 (5th Cir.), *cert denied,* 493 U.S. 937 (1989); *Mace v. Skinner,*

(continued...)

Frye's second claim has also been resoundingly rejected by the courts including this one. It is firmly established that the APA does not require publication of the FAA's policy to suspend or revoke certificates as a method of imposing sanctions for violations of FARs. *See Mace,* slip op. 11-12 *Foster,* 70 F.3d at 1088-89; *Rochna,* 929 F. at 15-16; *Tearney,* 868 F.2d at 1454; *Komjathy,* 832 F.2d at 1296-97; Go *Leasing,* 800 F.2d at 1522-24; *Dilley,* 49 F.3d at 669-670; *Dilley v. Skinner,* 48 F.3d 1231, 1995 WL 94703 (l0th Cir. 1995) (unpublished decision finding that "the FAA is not required to **[Page 10]** separately promulgate or publish the rules.") Smith continues to assert this claim even though he is all too aware of case law to the contrary. This is particularly egregious since Smith was counsel-of-record in *Go-Leasing, Knipe* and *Dilley.* As unpalatable these cases must be, Smith must accept them. Is a long established principle that Article III invests the courts with the power to say what the law is." Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177, 2 L.Ed. 60 (1803). Accordingly, those cases are the law.

The Court finds Smith's conduct particularly disturbing since he averred to the Court that this case was distinguishable from *Mace v. Skinner*, CTV 91-676-TUC-RMB. In *Mace*, the plaintiff's aircraft mechanic license was revoked for violations of the FARs. Mace was also represented by Smith. This Court in Mace ultimately granted defendants' motion to dismiss and

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[1](...continued)
CIV 91-676-TUC-RMB (D.Ariz. 1992), 34 F.3d 854 (9th Cir. 1994); *Foster v. Skinner*, CIV 92-557-PHX-CAM (D.Ariz. 1993), 70 F.3d 1084 (9th Cir. 1995); *Roundtree v. U.S.*, J92-029 CIV (D.Alaska 1992); *Roundtree v. Skinner*, A91-566-CIV-JKS (D.Alaska 1993), 40 F.3d 1036 (9th Cir. 1994)(unpublished decision); *Bellows v. Skinner*, A91-565 CIV (D.Alaska 1993), 42 F.3d 1398 (9th Cir. 1994) (unpublisheddecision); *Knipe v. Skinner*,91-CV-1338-TJM (N.D.N.Y. 1991); *Knipe v. United States*, 92-CV-1389-TJM-DNH (N.D.N.Y. 1993); *Dilley v. Skinner*, 91-NC1 19W (D.Utah 1991); *Dilley v. United States*, 92-NC-120W(D.Utah 1993), 16 F.3d 415 (l0th Cir. 1994); *Mace v. United States*, 92-750-TUC-WDB (D.Ariz. 1993), 42 F.3d 1400 (9th Cir. 1994) (unpublished decision).

entered a sanction against Smith requiring him to seek prior court approval for any future lawsuit involving the FAA. *See Mace v. Skinner*, CTV 91-676-TUC-RMB (D.Ariz. June 6, 1995). Smith ignored that Order and never formally sought permission to file the present case.

At the January 28, 1997 hearing in the case at bar, the Court specifically asked to distinguish *Mace*. Smith assured the Court that:

> Well, Mace against Skinner, number one, it's untrue that Your Honor said I couldn't bring anymore such suits. It's just in that case that you ordered the clerk not to accept anymore pleadings. Any way by that time I was worn out anyway and didn't appeal it.
>
> But the point – there s an absolute difference. One, you might go through Mace against Skinner and say — I don't remember specifically. That was an emergency revocation case. It raised a lot of different issues.

Transcript of January 28, 1997 at 8:16-24. Based on Smith's representations, the Court allowed discovery. After a careful review of the complaints and pleadings, Smith's statements to the Court were material misrepresentations which has cost the present defendants time and money and wasted the finite judicial resources of this Court. In *Mace*, Smith argued that Mace's Fifth Amendment due process rights were violated **[Page 11]** "because (1) the FAA has failed to formally promulgate compliance disposition rules pursuant to the procedures mandated by the APA; (2) the FAA has failed to publish in the Federal Register its policy of imposing certificate suspension or revocation as an alternative to a civil monetary penalty; (3) the FAA policy is an impermissible executive branch licensing penalty; and (4) the FAA's grant of emergency power pursuant to 49 U.S.C. § 1429(a) and 1485(a) is unconstitutional. *Mace*, slip op. at 3-4. Specifically, the *Mace* complaint alleged:

FIRST CAUSE OF ACTION

32. The suspension or revocation of pilot, mechanic or operating certificate by the FAA as a penalty or sanction for the violation of one or more FARs has never been authorized by law. Only Congress may constitutionally create penalties, sanctions, or benefits, that iS, it may not delegate its *Article I, Section I*, legislative authority to any other branch of the government. The use of certificate suspensions and revocations as penalties is now and always has been, since the federal government first initiated regulation of aviation through the Air Commerce Act of 1926, a creation of the executive branch, not Congress.

Id., Complaint, ¶ 32 (emphasis added). Mace also alleged:

FIFTH CAUSE OF ACTION

36. The Federal Aviation Administration has never promulgated a general rule that warns pilot, mechanic or operator that his license is at risk for the violation of any safety rule; nor a rule which advises that the Administrator claims the power to decide in his absolute discretion to have such charges tried administratively before the NTSB, incurring suspension or revocation rather than in United States District Court or, later in the CPDP program with the only penalty a money fine. *Agency failure to put such a rule in the Federal Aviation Regulations and cause it to be published in the Code of Federal Regulations denied plaintiff the right to have notice* of such an important and critical agency policy which can so drastically affect the property right that an FAA certificate represents.

Id. at ¶ 36 (emphasis added). Those two legal claims are identical in every respect to the ones raised today. The fact that *Mace* concerned an emergency revocation versus Frye's license suspension is irrelevant. *Mace* set forth the case law in detail recognizing the authority and the constitutional soundness of

the FAA to impose a revocation or suspension as a sanction. Id. at slip op. 8-10. That decision also cited the circuit cases **[Page 12]** which found that the APA did not require publication in the Federal Register or the Code of Federal Regulations. Id. at 11.

Mace, Foster, Mace, Roundtree, Rochna, Tearney, Komjathy, Go-Leasing, Knipe and Dilley establish that Smith knew his legal arguments in this case were "unwarranted by existing law" and that they could not be considered "nonfrivolous argument for the extension, modification, or reversal of existing law" in violating of Fed. R. Civ. P. ll(b)(2). Indeed, Smith has been sanctioned by district courts for his obstinacy apparently without effect. *See Foster*, 70 F.3d at 1089; *Roundtree*, 40 F.3d at 1040; *Knipe v. Skinner*, 19 F.3d 72, 78 (2d Cir. 1994).

Under ER 3.1, "[a] lawyer shall not bring . . . a proceeding, or assert or controvert an issue . . . unless there is a basis for doing so that is not frivolous, which includes a good faith argument for an extension, modification or reversal of existing law." Rules of Professional Conduct, ER 3.1. A lawyer is ethically obligation [sic] to exhibit candor to the court: "A lawyer shall not knowingly, make a false statement of material fact or law to a tribunal." ER 3.3(a)(1). Smith's conduct in this case implicates both of those rules. Under Local Rule 1.6(a), "[a]ny member of the bar of the Court may be disbarred or otherwise disciplined after such hearing as the Court may in each particular instance direct." The Court shall consider application of Rule 1.6 to this case.

One final point, federal law provides:

> Any attorney or other person admitted to conduct cases in any court of the United States or any Territory thereof who so multiplies the proceedings in any case unreasonably and vexatiously may be required by the court to satisfy personally the excess costs, expenses, and attorneys fees reasonably incurred because of such conduct.

28 U.S.C. § 1927. In light of the fact that the Court required Smith to re-evaluate the merits of this case and he chose to

proceed, sanctions under 1927 may be appropriate.

Based on the foregoing, Smith shall be required to show cause hearing as to why **[Page 13]** attorney should not be sanctioned for violating Fed. R. Civ. P. 11(b)(1) and (2), Ethical Rules 3.1 and 3.3(a)(1), 28 U.S.C. § 1927 and this Court's February 21, 1997 Order. The Court will consider whether action under Local Rule 1.6 and a complaint to the State Bar of Arizona is appropriate. Smith is directed to address the applicability of each of these violations in his brief. In response, Defendants are to submit an accounting of their attorneys' fees to be considered as one of the appropriate sanctions.

Rule 54(d)(1) provides, in pertinent part, that "costs other than attorneys' fees shall be allowed as of course to the prevailing party unless the court otherwise directs." A district court must generally award costs pursuant to Fed. R. Civ. P. 54(d)(1) unless the prevailing party is guilty of some fault, misconduct or default worthy of punishment. *See National Information Services, Inc. v. TRW, Inc. er al.*, 51 F.3d 1470 (9th Cir. 1995). There being no just reason to deny costs in this case, they shall be awarded to Defendants as the prevailing party.

IT IS ORDERED that Plaintiff's Motion for Preliminary Injunction and Motion to Determine Sufficiency of Defendants' Answers to Request for Admissions is **DENIED WITH PREJUDICE**;

IT IS FURTHER ORDERED that Plaintiff's Motion for Rule 11 Sanctions is **DENIED**;

IT IS FURTHER ORDERED that Defendants' Motion to Dismiss is **GRANTED** and judgment is hereby entered in favor of Defendants Frederico Pena; Linda H. Daschle; Nicholas G. Garaufis; Loretta Alkalay; and the National Transportation Safely Board and against Plaintiff Timothy P. Frye;

IT IS FURTHER ORDERED that pursuant to Fed. R. Civ. P. 54(d)(1), Plaintiff Timothy P. Frye shall be assessed Defendants' taxable costs. Defendants are directed to submit a bill of taxable costs to the Clerk of the Court in accordance with Local Rule 2.19;

[Page 14] IT IS FURTHER ORDERED that Lawrence P.

Smith shall file a brief on or before June 2, 1997 why he should not be disbarred from practicing in the District Court of Arizona, why a State Bar Complaint should not be filed and why he should not be sanctioned for violations of Fed. R. Civ. P. 11, E.R. 3.1 and 3.3(a)(1); 28 U.S.C. § 1927; and the Court's February 21, 1997 Order. Any response is due July 7, 1997 and any reply thereto, July 25, 1997;

IT IS FURTHER ORDERED that the sanctions hearing is set for **SEPTEMBER 15, 1997 AT 1:30 P.M.**

DATED: MAY 19. 1997

s/Richard M. Bilby
Senior United States District Court [sic]

FILED FEBRUARY 21, 1997
IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

TIMOTHY P. FRYE, Plaintiff
vs.
FREDERICO PENA, Secretary
Department of Transportation, et al.,
Defendants

NO. CIV 97-10 TUC RMB

ORDER

Defendants have filed a motion to have this Court reconsider its decision to allow Plaintiff's counsel, Lawrence B. Smith, Gary S. Grynkewich and Edward S. Coleman[1] discovery

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1 The Court is informed that Edward S. Coleman resigned from the California State Bar while disciplinary charges were pending. On February 4, 1997, Coleman was suspended from practice before this federal bar. Therefore, Coleman is no longer an attorney in good standing. Plaintiff's counsel are directed to remove his name from all

(continued...)

prior to ruling on Defendants' motion to dismiss and hearing on Plaintiff's motion for preliminary injunction. Defendants contend that Plaintiff's request is burdensome since this discovery entails 106 requests for admissions with subparts and review of over 200 pages of documents to confirm or deny that they are "genuine." Pursuant to Local Rule, a response to a motion for reconsideration is not allowed unless ordered by the Court. See Local Rule 1.10(f). After a review of the "Complaint for Declaratory and Injunctive Relief" and "Motion for Preliminary Injunction" and Defendants' "Emergency Motion for Reconsideration," the Court will grant reconsideration of its order and stay discovery. Due to the unique facts in the case which will be come apparent from below, the Court will not allow a response.

[Page 2] After reviewing this Order and Plaintiff still desires the requested discovery, he must post a bond. This bond will insure that in the event Defendants prevail, there will be sufficient funds to cover Defendants' fees and costs. After said bond is posted, the Court will set a new deadline for the request for admissions.

II.

In this case, Plaintiff's air transport pilot certificate was suspended 90 days because he repossessed a 747 [sic] aircraft which was later found to be un-airworthy. He claims that the suspension prevents him from obtaining employment with a commercial airline. He is currently serving as a private pilot for an Saudi Arabian sheik.

Frye claims in that (1) his Fifth Amendment due process rights and were violated when the FAA relied on Section 609 of the Federal Aviation Act of 1958, 49 U.S.C. § 44709 (1994) to suspend his license when there is no authority to do so and (2) the FAA's failure to publish its interpretation of Section 609 violates the Administrative Procedures Act. The Court's initial

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[1](...continued)
future pleadings. If the Court's decision is based on misapprehension of the facts, it will entertain an appropriate motion on the issue.

determination is that these issues have been litigated, and litigated, and re-litigated by Plaintiff's present counsel, Lawrence B. Smith.

Recently, the Ninth Circuit affirmed the district court's order dismissing one of Smith's cases which arguably raises the very issues presented here. In *Foster v. Skinner*, 33 F.3d 1084 (9th Cir. 1995) claims 1-9 asserted that the FAA lacked authority to suspend or revoke pilot certificates for safety violations and claims 5-8, 10 and 11 alleged that the FAA violated the APA by not publishing rules regarding suspensions and not giving Foster notice and an opportunity to comment on the rules. Id. at 1087. *Foster* held that *Go Leasing v. NTSB*, 800 F.2d 1514 (9th Cir. 1986) and decisions in the First, Fifth, Tenth and D.C. Circuit disposed of claims 1,2,3,4,5,6,7,8,10, and 11.

With reference to the due process claim, Foster held "the FAA Administrator's subordinates does not constitute a violation of Foster's due process rights because clear authority establishes that the FAA Administrator, in his discretion, may suspend and **[Page 3]** revoke pilot certificates." Id. at 1088 (citing *Go Leasing v. NTSB*, 800 F.2d 1514, 1523 (9th Cir. 1986); *Dilley v. National Transp. Safety Bd.*, 49 F.3d 667 (10th Cir. 1995); *Tearney v. National Transp. Safety Bd.*, 868 F.2d 1451 (5th Cir.), *cert. denied*, 493 U.S. 937 (1989) and *Komjathy v. National Transp. Safety Bd.*, 832 F.2d 1294 (D.C. Cir. 1987), *cert. denied*, 486 U.S. 1057 (1988). "Moreover, 14 C.F.R. 13.19(b) (1995) provides that the FAA Administrator's authority to suspend or revoke certificates may be exercised by "the Chief Counsel for Regulations and Enforcement, and the Assistant Chief Counsel for the region or the Aeronautical Center." *Id.* Additionally, *Dilley*, decided before *Foster*, agreed with the First, Fifth and District of Columbia Circuits when it held in a case also litigated by Smith, that "the APA does not require the FAA to promulgate a rule or to publish policy stating that it may suspend a pilot's certificate for violations of the Federal Aviation Regulations." *Dilley*, 49 F.3d at 670. Moreover, Fifth amendment due process challenges to section

609 were raised and rejected in a prior Smith case before this Court. See *Mace v. Skinner*, CIV 91-676 (Order of June 6, 1995).

Plaintiff's counsel are reminded that it is unethical for a lawyer to "bring . . . a proceeding, or assert or controvert an issue therein, unless there is a basis for doing so that is not frivolous which includes a good faith argument for extension, modification or reversal of existing law." See, Rule 3.1, Arizona Rules of Professional Conduct. Accordingly, the Court will allow the briefing to continue in order that counsel may attempt to distinguish this case from all previous unsuccessful cases.

Counsel is specifically directed to re-evaluate the present case in light of prior circuit case law and to dismiss it under Fed. R. Civ. P. 41(a)(2) without fear of court sanctions, if appropriate. If, however, Counsel chooses to pursue this case and the Court grants Defendants' motion to dismiss, the Court will enter sanctions which may include monetary sanctions and a complaint filed with the State Bar of Arizona.

[Page 4] III.

Accordingly,

IT IS ORDERED that:

(1) Defendant's Emergency Motion for Reconsideration is GRANTED and all discovery STAYED until the Court rules on Defendants' motion to dismiss;

(2) Discovery may proceed if Plaintiff's Counsel posts a bond in the amount of $20,000 with the Clerk of the Court;

[Sic](4) If Defendants prevail on the motion to dismiss, the Court will consider entering sanctions which may include monetary sanctions as well as a State Bar Complaint;

(5) To avoid court-sanctions, counsel Lawrence B. Smith and Gary S. Grynkewich have until MARCH 3, 1997 to dismiss this matter under Fed. R. Civ. P.41(a)(2).

DATED: February 21, 1997

s/Richard M. Bilby
Senior United States
District Court [sic]

[FILED JAN. 6, 1997]

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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

No. CIV 97-10 TUC RMB

TIMOTHY P. FRYE,
Plaintiff,

FREDERICO PENA, Secretary
Department of Transportation,
LINDA H. DASCHLE, Acting Admin-
stator, Federal Aviation Administration,
NICHOLAS G. GARAUFIS, Chief Counsel, Federal Aviation
Administration,
LORETTA E. ALKALAY, Assistant
Chief Counsel, Eastern Region, Federal

Aviation Administration,
NATIONAL TRANSPORTATION SAFETY BOARD,
Defendants.

COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

[Page two] Plaintiff Timothy P. Frye, complains and alleges:

JURISDICTION

1. This is a civil action which seeks declaratory and injunctive relief. Jurisdiction arises under 28 U.S.C. § 1331. Such relief is authorized by 28 U.S.C. §§ 2201 & 2202. The scope of judicial review of wrongful federal agency action is mandated by the Administrative Procedure Act (APA), 5 U.S.C. §§ 702-706.

PARTY PLAINTIFF

2. Timothy P. Frye is a resident of Pima County, State of Arizona.

PARTIES DEFENDANT

3. Frederico Pena, who may be found in Washington, D.C., is Secretary, Department of Transportation (DOT).

4. Linda H. Daschle, who may be found in Washington, D.C., is Acting Administrator, Federal Aviation Administration (FAA).

5. Nicholas G. Garaufis, who may be found in Washington, D.C., is Chief Counsel, Federal Aviation Administration.

6. Loretta Alkalay, who may be found in Jamaica, New York, is Assistant Chief Counsel, Eastern Region, Federal Aviation Administration.

7. The National Transportation Safety Board may be found in Washington, D.C.

BACKGROUND ALLEGATIONS

8. Timothy P. Frye (Capt. Frye), presently and at all times relevant to the issues herein, has held an FAA Air Transport Pilot (ATP) certificate. Under date of February 16, 1996 he was served by the FAA Eastern Region with a Notice of Proposed Certificate Action (NOPCA). It proposed to suspend his ATP for a period of 180 days on account of certain alleged violations

of the Federal Aviation Regulations (FARs), which may be found in the Code of Federal Regulations, 14 CFR Pts 1-199. The charges centered around the claim that he had operated an unairworthy aircraft.

9. After an informal conference between his counsel and the FAA's, he received under date of October 18, 1996 an Order of Suspension that ordered his ATP suspended for a period of 90 days. The order was issued under the name and authority of defendant Loretta E. Alkalay, with **[Page 3]** her authority delegated from the FAA Administrator. It has been appealed to the National Transportation Safety Board (NTSB) for a hearing (trial) on the merits of the charges.

10. The event out of which the violation charges arose occurred in the early morning hours of October 7, 1995 at Pittsburgh International Airport. With a co-pilot, he repossessed a Boeing B-737 aircraft and depaed with it for Tucson, Arizona.

11. That aircraft, and one other 737, had been subleased by Viscount Air Services, Inc. of Tucson to Nation's Air, a scheduled aircarrier headquartered in Atlanta, Georgia (a mini-Valu-Jet). As Viscount's chief pilot, Capt. Frye oversaw the operation, not including Nation's, of eleven 737s and two 727s used in charter for sports teams and casinos.

12. Nation's Air was in serious default on its monthly lease payments for the two 737s in the approximate amount of $ 200,000. Moreover, Nation's Air, without Viscount's required approval, had placed one aircraft in Dallas, Texas at a repair facility for costly heavy maintenance, rather than Viscount's choice of facility. So a decision was made to repossess the one operating aircraft at Pittsburgh. After arriving at the airport, armed with papers showing Viscount's legal right to repossess the aircraft, Capt. Frye cleared his mission with the airport manager. Then, accompanied by an airport police officer, he proceeded to the aircraft where it had been parked after a midnight arrival. After walk-around, while his co-pilot pre-flighted the cockpit, he checked the aircraft logs for any airworthiness discrepancies written up by the previous captain that would have rendered the aircraft unairworthy. Finding

none, at about 3:30 o'clock a.m. he fired up the engines and departed for Cleveland, Ohio to refuel for the leg to Tucson.

13. The repossession made press and radio in Pittsburgh and Atlanta, including *USA Today*. The FAA was asked how, during a Level III security alert (next to highest), someone could walk out to an airliner at a major airport and drive off with it.

14. At an unknown time subsequent to Capt. Frye's departure, two Nation's Air mechanics got together with an FAA inspector and reported that Frye had taken off with the 737 in an unairworthy condition. From this arose the three principal charges contained in the NOPCA: "(a) the APU had excessive AMP draw on startup; (b) the #1 CSD needed servicing; and (c) the left outboard landing light was missing a bulb and was thereby inoperative."

15. Charges (a) and (b) were facially false, (c) was unrelated to airworthiness. So obvious **[Page 4]** was their falsity, charges (a) and (b), as a result of the informal conference when this was brought to the attention of FAA lawyers, were dropped from the Order of Suspension.[1] The missing lightbulb remained the single charge of unairworthiness.

16. At all times relevant to the allegations and claims made herein defendant DOT Secretary Frederico Pena had overall responsibility for that agency's various modalities, including the FAA. The FAA Administrator was and is directly responsible by law, and by delegation of authority from the DOT Secretary,

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1 Auxiliary Power Unit. A small jet engine, when the aircraft is on the ground it is used to power lights, airconditioning, instruments, and start the engines. The charge is facially false because the APU ammeter, showing current draw from the batteries, will always peg full-over, so there is no way to tell in the cockpit it is drawing too many amps. Constant Speed Drive. It is a fluid-drive that interfaces between the generator and the extremely high RPM main-engine jet turbine to keep the former at a much slower and constant speed. "Servicing" means it needed oil. To find that out a mechanic would have to undo at least eight fasteners on the cowling, then secure it open. No mechanic would do that and not immediately go get the needed oil, add it, *then* close the cowling.

for all FAA actions.

17. At all times relevant to the allegations and claims made herein defendants FAA Chief Counsel Nicholas G. Garaufis and Assistant Chief Counsel Loretta E. Alkalay had the responsibility and authority delegated from the Administrator to initiate enforcement actions and to order suspension and revocation of airman certificates.

18. At all times relevant to the allegations and claims made herein defendant National Transportation Safety Board had the statutory duty to review FAA orders of suspension and revocation of airmen certificates.

CLAIMS FOR RELIEF

FIFTH AMENDMENT RIGHT TO DUE PROCESS

19. The use of a license suspension to punish Capt. Frye for an alleged violation of the Federal Aviation Regulations violated his fifth amendment right not to be deprived of life, liberty or property without due process of law, on the following grounds:

FIRST CAUSE OF ACTION

20. The FAA's claim of authority to punish an airman for the alleged violation of a safety regulation by suspending his pilot's license is based on Section 609 of the Federal Aviation Act **[Page 5]** of 1958 (FA Act), as amended. The contention is that certain language in that section authorizes the FAA Administrator to suspend or revoke certificates anytime he deems "that safety in air commerce or air transportation and the public interest requires . . ."

21. Based upon this vague language federal aviation officials decided that it was in the interests of air safety to impose suspensions and revocations on certificate holders as punishment for safety violations—obviously figuring that no one could argue with the logic of that. This, even though no language is contained in Section 609 that so much as hints at a connection between the commission of a safety violation and suspension or revocation of a pilot's license, or any other certificate; no words, such as, "regulation," "violation," "sanction," or "penalty."

22. Thus, based on these officials' own statutory interpretation,

logic dictates that the executive branch of the federal government, not the Congress, created certificate penalties. It is fundamental under Article I, § 1, of the Constitution that only the legislative branch of the federal government, not the executive, may create penalties, or benefits, *i.e.* food stamps. Thus the imposition upon Capt. Frye of a suspension of his pilot's license as a penalty for alleged air-safety violations violated his Fifth Amendment right to due process.

SECOND CAUSE OF ACTION

23. Although they have claimed authority to impose license penalties for almost four decades, FAA officials have never given the public any notice of this in the Code of Federal Regulations — or any other official federal publication — that they make such a claim. This failure to tell airmen, including Capt. Frye, that their licenses are at risk for the violation of a safety rule violated his Fifth Amendment right to due process.

RELIEF REQUESTED

WHEREFORE, plaintiff prays for the following relief:

1. A judgment that declares plaintiff's constitutional rights have been violated.
2. For a permanent injunction enjoining defendants from further pursuing the certificate action initiated against plaintiff.
3. Pending final hearing and determination hereof, that a preliminary injunction or other appropriate writ be issued ordering defendants to cease and desist from further pursuing the certificate action against plaintiff. **[Page 6]**
4. That upon final hearing and determination hereof said preliminary injunction or other writ be made permanent.
5. For costs and such attorney fees as are allowed by law.
6. For such other and further relief as the Court may deem just and equitable.

Respectfully submitted,
ATTORNEYS FOR PLAINTIFF

Gary S. Grynkewich
Whitehill, Linden, Grynkewich

& Halladay, P.C.

Edward S. Coleman

Lawrence B. Smith

VERIFICATION

I, Lawrence B. Smith, one of the attorneys for plaintiff herein, verify under penalty of perjury that the contents of the foregoing complaint are true and correct, and as to those things alleged upon information and belief I believe them to be true.

Executed: January 6, 1996

Lawrence B. Smith

Fed.R.Civ.P.11

Rule 11. Signing of Pleadings, Motions and Other Papers, Representations to Court; Sanctions

(a) **Signature.** Every pleading, written motion, and other paper shall be signed by at least one attorney of record in the attorney's individual name, or, if the party is not represented by an attorney, shall be signed by the party. Each paper shall state the signer's address and telephone number, if any. Except when otherwise specifically provide by rule or statute, pleadings need not be verified or accompanied by affidavit. An unsigned paper shall be stricken unless omission of the signature is corrected promptly after being called to the attention of the attorney or party.

(b) **Representations to Court**. By presenting to the court (whether by signing, filing, submitting, or later advocating) a pleadings, written motion, or other paper, an attorney or unrepresented party is certifying that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances, —

(1) it is not being presented for any improper purpose, such as to harass or to cause unnecessary delay or needless increase

in the cost of litigation;

(2) the claims, defenses, and other legal contention therein are warranted by existing law or the establishment of new law;

(3) the allegations and other factual contentions have evidentiary support, or after a reasonable opportunity for further investigation or discovery; and

(4) the denials of factual contentions are warranted on the evidence or, of specifically so identified, are reasonable based on a lack of information or belief.

(c) Sanctions. If, after notice and a reasonable opportunity to respond, the court determines that subdivision (b) has been violated, the court may, subject to the conditions stated below, impose an appropriate sanction upon the attorneys, law firms, or parties that have violated subdivision (b) or are responsible for the violation.

(1) How initiated.

(A) By Motion. A motion for sanctions under the rule shall be made separately from other motions or requests and shall describe the specific conduct alleged to violate subdivision (b). It shall be served as provided in Rule 5, but shall not be filed with or presented to the court unless, within 21 days after service of the motion (or such other period as the court may prescribe), the challenged paper, claim, defense, contention, allegation, or denial is not withdrawn or appropriately corrected. If warranted, the court may award to the party prevailing on the motion the reasonable expenses and attorney's fees incurred in presenting or opposing the motion. Absent exceptional circumstances, a law firm shall be held jointly responsible for violations committed by its partners, associates, and employees.

(B) On Court's Initiative. On its own initiative, the court may enter an order describing the specific conduct that appears to violate subdivision (b) and directing an attorney, law firm, or party to show cause why it has not violated subdivision (b) with respect thereto.

(2) Nature of Sanction; Limitations. A sanction imposed for violation of this rule shall be limited to what is sufficient to

deter repetition of such conduct or comparable conduct by others similarly situated. Subject to the limitations in subparagraphs (A) and (B), the sanction may consist of, or include, directives of a nonmonetary nature, an order to pay a penalty into court, or, if imposed on motion and warranted for effective deterrence, an order directing payment to the movant of some or all of the reasonable attorneys' fees and other expenses incurred as a direct result of the violation.

(A) Monetary sanctions may not be awarded against a represented party for a violation of subdivision (b)(2).

(B) Monetary sanctions may not be awarded on the court's initiative unless the court issues its order to show cause before a voluntary dismissal or settlement of the claims made by or against the party which is, or whose attorneys are, to be sanctioned.

(3) Order. When imposing sanctions, the court shall describe the conduct determined to constitute a violation of this rule and explain the basis for the sanction imposed.

(d) Inapplicability to Discovery. Subdivisions (a) through (c) of this rule do not apply to disclosures and discovery requests, responses, objections, and motions that are subject to the provisions of Rules 26 through 37.

(As amended Apr. 22, 1993, eff. Dec. 1, 1993.)

Fed.R.Civ.P.12(b)(6) – Every defense, in law or fact, to a claim for relief in any pleading, whether a claim, counterclaim, cross-claim, or third-party claim, shall be asserted in the responsive pleading thereto if one is required, except the following defenses may at the option of the pleader by made by motion: (1) lack of jurisdiction over the subject matter, (2) lack of jurisdiction over the person, (3) improper venue, (4) insufficiency of process, (5) insufficiency of service of process, (6) failure to state a claim upon which relief can be granted, (7) failure to join a party under Rule 19. A motion making any of these defenses shall be made before pleading if a further pleading is permitted. No defense or objection is waived by being joined with one or more other defenses or objections in

a responsive pleading or motion. If a pleading sets forth a claim for relief to which the adverse party is not required to serve a responsive pleading, the adverse party may assert at the trial any defense in law or fact to that claim for relief. If, on a motion asserting the defense numbered (6) to dismiss for failure of the pleading to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given a reasonable opportunity to present all material made pertinent to such a motion by Rule 56.

Administrative Procedure Act

5 U.S.C. § 551 — Definitions

For the purpose of this subchapter —

(1) "agency" means each authority of the Government of the United States, whether or not it is within or subject to review by another agency, but does not include * * * *

(4) "rule" means the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or describing the organization, procedure, or practice requirements of an agency * * *

5 U.S.C. § 552(a)(1) — Public information; agency rules, opinions, orders, records, and proceedings

(a) Each agency shall make available to the public information as follows:

(1) Each agency shall separately state and currently publish in the Federal Register for the guidance of the public —

(A) descriptions of its central and field organization and the established places at which, the employees (and in the case of a uniformed service, the members) from whom, and the methods whereby, the public may obtain information, make submittals or requests, or obtain decisions;

(B) statements of the general course and method by which

its functions are channeled and determined, including the nature and requirements of all formal and informal procedures available;

(C) rules of procedure, descriptions of forms available or the places at which forms may be obtained, and instructions as to the scope and contents of all papers, reports, or examinations;

(D) substantive rules of general applicability adopted as authorized by law, and statements of general policy or interpretations of general applicability formulated and adopted by the agency; and

(E) each amendment, revision, or repeal of the foregoing.

Except to the extent that a person has actual and timely notice of the terms thereof, a person may not in any manner be required to resort to, or be adversely affected by, a matter required to be published in the Federal Register and not so published. For the purpose of this paragraph, matter reasonably available to the class of persons affected thereby is deemed published in the Federal Register when incorporated by reference therein with the approval of the Director of the Federal Register.

5 U.S.C. § 553 — Rule making

(a) This section applies, according to the provisions thereof, except to the extent that there is involved —

(1) a military or foreign affairs function of the United States; or

(2) a matter relating to agency management or personnel or to public property, loans, grants, benefits, or contracts.

(b) General notice of proposed rule making shall be published in the Federal Register, unless persons subject thereto are named and either personally served or otherwise have actual notice thereof in accordance with law. The notice shall include —

(1) a statement of the time, place, and nature of public rule making proceedings;

(2) reference to the legal authority under which the rule is proposed; and

(3) either the terms or substance of the proposed rule or a description of the subjects and issues involved.

Except when notice or hearing is required by statute, this subsection does not apply --

(A) to interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice; or

(B) when the agency for good cause finds (and incorporates the finding and a brief statement of reasons therefor in the rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest.

(c) After notice required by this section, the agency shall give interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments with or without opportunity for oral presentation. After consideration of the relevant matter presented, the agency shall incorporate in the rules adopted a concise general statement of their basis and purpose. When rules are required by statute to be made on the record after opportunity for an agency hearing, sections 556 and 557 of this title apply instead of this subsection.

(d) The required publication or service of a substantive rule shall be made not less than 30 days before its effective date, except --

(1) a substantive rule which grants or recognizes an exemption or relieves a restriction;

(2) interpretative rules and statements of policy; or

(3) as otherwise provided by the agency for good cause found and published with the rule.

(e) Each agency shall give an interested person the right to petition for the issuance, amendment, or repeal of a rule.

5 U.S.C. § 558 — Imposition of sanctions,; determination of applications for licenses; suspension, revocation, and expiration of licenses

(a) This section applies, according to the provisions thereof, to the exercise of a power or authority.

(b) A sanction may not be imposed or a substantive rule or order issued except within jurisdiction delegated to agency and as authorized by law. * * * *

5 U.S.C. § 706 — Scope of review

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall

(1) compel agency action unlawfully withheld or unreasonably delayed; and

(2) hold unlawful and set aside agency action, findings, and conclusions found to be --

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(B) contrary to constitutional right, power, privilege, or immunity;

(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;

(D) without observance of procedure required by law;

(E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or

(F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court. In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.

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28 U.S.C. § 1927 – Any attorney or other person admitted to conduct cases in any court of the United States or any Territory thereof who so multiplies the proceedings in any case

unreasonably and vexatiously may be required by the court to satisfy personally the excess costs, expenses, and attorneys' fees reasonably incurred because of such conduct.

FEDERAL AVIATION ACT OF 1958, Section 609
PUBLIC LAW 85-726-AUG. 23,1958,
72 Stat. 779-80

The Administrator may, from time to time, reinspect any civil aircraft, aircraft engine, propeller, appliance, air navigation facility, or air agency, or may reexamine any civil airman. If, as a result of any such reinspection or reexamination, or if, as a result of any other investigation made by the Administrator, he determines that safety in air commerce or air transportation and the public interest requires, the Administrator may issue an order amending, modifying, suspending, or revoking, in whole or in part, any type certificate, production certificate, airworthiness certificate, airman certificate, air carrier operating certificate, air navigation facility certificate, or air agency certificate. **[What follows not relevant to any issue herein.]** Prior to amending, modifying, suspending, or revoking any of the foregoing certificates, the Administrator shall advise the holder thereof as to any charges or other reasons relied upon by the Administrator for his proposed action and, except in case of emergency, shall provide the holder of such certificate an opportunity to answer any charges and be heard as to why such certificate should not be amended, modified, suspended, or revoked. Any person whose certificate is affected by such an order of the Administrator under this section may appeal the Administrator's order to the Board and the Board may, after notice and hearing, amend, modify, or reverse the Administrator's order if it finds that safety in air commerce and the public interest do not require affirmation of the Administrator's order. In the conduct of its hearings the Board shall not be bound by findings of fact of the Administrator. The filing of an appeal with the Board shall stay the effectiveness of the Administrator's order unless the Administrator advises the

Board that an emergency exists and safety in air commerce or air transportation requires the immediate effectiveness of this order, in which event the order shall remain effective and the Board shall finally dispose of the appeal within sixty days after being so advised by the Administrator. The person substantially affected by the Board's order may obtain judicial review of said order under the provisions of section 1006, and the Administrator shall be made a party to such proceedings.

72 Stat. 783

§ 901(a)(1) (pertinent parts):

(a)(1) Any person who violates (A) any provision of titles III, V, VI, VII, or XIII of this Act, or any rule, regulation or order issued thereunder * * * shall be subject to a civil penalty of not to exceed $1,000 for each such violation * * *

(2) Any such civil penalty may be compromised by the Administrator in the case of violations of titles III, V, VI, or XII or any rule regulation, or order issued thereunder * * *

72 Stat. 786, § 903(b)(1) (pertinent parts):

(b) Procedure in respect of civil penalties

(1) Any civil penalty imposed or assessed under this chapter may be collected by proceedings in personam against the person subject to the penalty . . . Such proceedings shall conform as nearly as may be to civil suits in admiralty . . . [and] either party may demand trial by jury of any issue of fact, if the value in controversy exceeds $20, and the facts so tried shall not be reexamined other than in accordance with the rules of the common law.

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

FILED MAY 20, 1997
Civil Action
No. CV-97-10-TUC-RMB

TIMOTHY P. FRYE, Plaintiff,
v.
FREDERICO PENA, Secretary, Department of Transportation, et al, Defendants.

DEFENDANTS' MEMORANDUM IN SUPPORT OF THEIR MOTION TO DISMISS AND RESPONSE IN OPPOSITION TO PLAINTIFF'S MOTION FOR A PRELIMINARY INJUNCTION

Introduction

This lawsuit raises claims that are substantially identical to claims previously raised by one of plaintiff's counsel in numerous lawsuits. Because plaintiff's counsel has not won any claim in any prior lawsuit and has instead been subject to sanctions for continuing to press losing arguments, requiring

defendants to respond to any discovery requests prior to the Court's decision on the motion to dismiss would be inconsistent with established law and with fairness. Nothing in the requests for admission will assist the Court in making its determination on defendants' motion to dismiss. Instead it will reward plaintiff's counsel for continuing to harass the FAA and NTSB with frivolous claims and for tying up the time of numerous courts.

The United States Court of Appeals for the Ninth Circuit and at least four other Circuit Courts have specifically held that the Federal Aviation Administration ("FAA") has authority under the Federal Aviation Act ("FA Act"), 49 U.S.C. §§ 4Ol01 et seq., to revoke or suspend pilots' licenses for safety violations. Case law also holds that there is no due process violation caused by the alleged failure of the FAA to publish its stated authority to suspend pilots. Despite the established law of this Circuit and the issuance of sanctions against one of plaintiff's counsel for repeatedly pressing his contrary interpretation of the Act, plaintiff seeks to short-circuit the administrative process set up by Congress in the Federal Aviation Act for determining whether to suspend for ninety days plaintiff's pilotis license. Instead of awaiting the National Transportation Safety Board's decision on plaintiff's appeal of the FAA suspension order, plaintiff asks this Court to enjoin further agency action and ignore Ninth Circuit jurisprudence in doing so. Plaintiff's characterization of this challenge as an Administrative Procedure Act/Fifth Amendment Due Process Clause challenge, as opposed to the earlier Bivens Act and Federal Torts Claims Act litigation brought in this Circuit, does not change the underlying legal reality that has been unequivocally recognized by the Ninth and other Circuits: the FA Act provides the statutory authority for the action under challenge here and also provides rights which satisfy constitutional due process requirements.

Accordingly, this action should be dismissed. First, plaintiff has filed this action prematurely, during the pendency of his administrative appeal which could conceivably result in setting

aside the suspension order and thus eliminate any need for judicial review. Second, the traditional deference accorded an agency's interpretation of its statutory authority is here not just bolstered, but affirmed, by the Ninth Circuit's earlier holding that the Act does in fact authorize administrative actions of the type at issue here. Whether plaintiff will have, upon completion of the administrative process, some other APA or Fifth Amendment challenge remains to be seen. But it is clear, here and now, that the plaintiff's attempt to stop the administrative process in its tracks must fail. The utter refusal of overzealous counsel to accept the law as it is should not be countenanced.

For the same reasons, plaintiff's motion for preliminary injunctive relief must fail. Not only does plaintiff lack any likelihood that he will succeed on the merits, he cannot show the irreparable injury necessary to support a preliminary injunction He continues to fly, since his appeal to the NTSB has stayed the FAA suspension order. Nor has he established irreparable injury by his expressed interest in applying to another airline during the pendency of this lawsuit, and by his speculation that such airline will be uninterested in him given the administrative process. Nothing stops him from applying, and a preliminary injunction will not erase the safety violation which gave rise to the FAA action, nor will it preclude the possibility that the suspension will ultimately be imposed. Further, the public interest tips in favor of completion of the administrative process. An injunction would frustrate the purpose of the Federal Aviation Act as mandated by Congress and would therefore, disserve the public interest.

Statutory and Regulatory Background

The Federal Aviation Act of 1958 ("FA Act") describes "assigning and maintaining safety as the highest priority in air commerce."49 U.S.C. § 40101(a)(1) (1996).[1] The Act authorizes the Administrator of the Federal Aviation

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1 In 1994, Congress recodified the Act without substantive change at 49 U.S.C. §§ 40101 et seq. See Pub. L. No. 103-272, 103 Stat. 745, 1093 (1994). All references will be to the recodified Code sections.

Administration ("FAA") to prescribe air safety standards in order to "promote safe flight of civil aircraft in air commerce." 49 U.S.C. § 44701(a).

The FA Act empowers the Administrator to issue "airman certificates," 49 U.S.C. § 44702(a), containing such terms as "the Administrator decides are necessary to ensure safety in air commerce," 49 U.S.C. § 44703(b)(1)(C). "Airman certificates" authorize individuals to serve as, inter alia, pilots, aircraft mechanics, or flight crew members. 49 U.S.C. § 40102(a)(8).

Pursuant to 49 U.S.C. § 44709(a), the Administrator "may * * * at any time * * * reexamine an airman" to whom an aviation certificate was previously issued. After such a reexamination or other investigation, the Administrator is empowered to issue orders "amending, modifying, suspending, or revoking * * * any part" of an aviation certificate previously issued if the Administrator determines that "safety in air commerce or air transportation and the public interest require that action. 49 U.S.C. § 44709(b)(1)(A). Prior to taking any such action, the Administrator must advise the certificate holder of "the charges or other reasons on which the Administrator relies for the proposed action," and, "[e]xcept in an emergency," provide an opportunity to answer the charges. 49 U.S.C. § 44709(c).

The affected airman may file an administrative appeal to the National Transportation Safety Board ("NTSB"),[2] 49 U.S.C. § 44709(d)(1), which stays the effectiveness of the **[Page 6]** Administrator's order, 49 U.S.C. § 44709(e). The NTSB may alter the Administrator's decision "[a]fter notice and an opportunity for a hearing" if, inter alia, the Board finds "that

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2 This appeal is actually a two-step process. First, the airman appeals to the Office of Administrative Law Judges at the NTSB. He is given notice and an opportunity for a hearing. After that, the judge issues an initial decision from which either side may appeal. If neither party appeals, that decision becomes final. If there is an appeal, that appeal is taken to the five-member NTSB. That Board may alter, amend, modify, or reverse the decision of the ALJ. After that decision, either side may appeal to the court of appeals. See 49 C.F.R. part 821.47.

safety in air commerce or air transportation and the public interest do not require affirmation of the order." 49 U.S.C. § 44709(d)(1)(A). In addition, "[t]he Board may modify a suspension or revocation of a certificate to imposition of a civil penalty." 49 U.S.C. § 44709(d)(2).

"A person substantially affected by an order of the Board" may file a petition for review in the federal courts of appeals within 60 days after the order has issued. 49 U.S.C. § 44709(f); see also 49 U.S.C. § 46110(a). The courts of appeals have "exclusive jurisdiction to affirm, amend, modify, or set aside any part of the order and may order the Secretary or Administrator to conduct further proceedings." 49 U.S.C. § 46110(c).[3]

Statement of Facts

Plaintiff Timothy P. Frye is the holder of an airline transport pilot's certificate. Compl. ¶ 8. This certificate entitles him to carry passengers or cargo for hire. On February 16, 1996, the Federal Aviation Administration notified plaintiff by mail that it proposed suspending his pilot's certificate for a period of 180 days for violating certain Federal Aviation Regulations. On Sept 17, 1996, an informal conference was held between plaintiff and the FAA. Pursuant to that conference, the FAA dismissed several charges against plaintiff and the proposed sanction was decreased from 180 days to 90 days. On October 18, 1996, the Federal Aviation Administration issued plaintiff an order suspending his commercial pilot certificate for a period of 90 days. *Id.* at ¶ 9. The suspension order charged that plaintiff had violated a number of Federal Aviation Regulations[4] (FARs) by operating an unworthy aircraft and by operating an aircraft in a careless or reckless manner when he was piloting a Boeing B737 on October 7, 1995, on a flight

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3 The National Transportation Safety Board should be dismissed as a defendant as the plaintiff completely fails to make any allegations of fact against the NTSB. See Compl.

4 See generally 14 C.F.R. Parts 1 et. seq.

from Pittsburgh, Pennsylvania to Tucson, Arizona. According to the Order of Suspension, the FAA Administrator, on whose behalf the order was issued, had determined that both public interest and safety in air commerce required the suspension of the plaintiff's commercial pilot certificate for a period of 90 days. See "Order of Suspension" attached hereto.

The plaintiff filed an appeal with the NTSB on November 4, 1996. The filing of this appeal stays the order during the pendency of the appeal before the NTSB. As of this date, the appeal continues to be pending before the NTSB awaiting a hearing date, and plaintiff continues to be able to fly under authority of his pilot's certificate. Plaintiff currently is the captain of a Boeing B-727 owned by a Saudi Arabian citizen for his own private transportation and is based in Riyadh, Saudi Arabia. Plaintiff's Memorandum in Support of Motion for Preliminary Injunction at ¶ 5.

ARGUMENT

I. THE COURT LACKS SUBJECT MATTER JURISDICTION

1. There is No Final Agency Action Which Gives This Court Jurisdiction

Plaintiff seeks judicial review under the APA, which ordinarily allows review only after a final agency action has taken place. "The test of finality in this sense is not whether the order is the last administrative action contemplated under the statutory scheme, but whether the consequences of the order are sufficiently concrete and definite to warrant review." Nevada Airlines v. Bond, 622 F.2d 1017, 1020 n. 5 (9th Cir 1980). See also FTC v. Standard Oil Co., 449 U.S. 232 (1980). A court may review a nonfinal agency action only in "extraordinary circumstances," such as where there is "clear violation of the law," or if the action will cause a party "severe and irreparable harm." American Train Dispatchers Ass'n. v. ICC, 949 F.2d 413, 414 (D.C.Cir. 1991).

No such "concrete and definite" action has as yet occurred, nor are there any "extraordinary circumstances" warranting review at this stage. Indeed there remains the possibility that the

NTSB will modify or set aside the FAA suspension order, leaving the plaintiff and his counsel nothing on which to base this latest challenge. Further, as the case law unequivocally shows, the FAA order does not constitute a "clear violation of the law."

Recently, the Ninth Circuit held that an optional appeal to an administrative law judge rendered an agency administrator's initial decision nonfinal for purposes of judicial review under the APA, and, therefore, the claims were not ripe for review.[5] Acura of Bellevue v. Reich, 90 F.3d 1403, 1407 (9th Cir. 1996)(plaintiffs seeking APA judicial review and requested declaratory and injunctive relief from an agency decision) relying upon *Stone v. INS*, __ U.S. __, 115 S.Ct. 1537, 131 L.Ed.2d 465 (1995). The Ninth Circuit's reasoning is appropriate here, as well: "[a]llowing judicial review in the middle of the agency review process unjustifiably interferes with the agency's right to consider and possibly change its position during its administrative proceedings." Id. at 1408-09.

Moreover, an attack on the authority of an agency to conduct an investigation, or take the challenged action in the first place, does not obviate the finality requirement. Veldhoen v. U.S. Coast Guard, 35 F.3d 222, 225 (5th Cir. 1994)(challenge to agency investigation not judicially reviewable because there was no final agency action); see Aluminum Co. of America v. U.S., 790 F.2d 938, 942 (D.C.Cir. 1986)(claim that agency action is beyond statutory authority does not make a difference for finality analysis); Ticor Title

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5 Review under the APA of agency action is nearly always limited to the administrative record presented by the agency to the reviewing court. Florida Power & Light Co. v. Lorion, 470 U.S. 729, 743-44 (1985); Camp v. Pitts, 411 U.S. 138, 142 (1973); Citizens to Preserve Overton Park, 401 U.S. 402, 420 (1971); Friends of the Earth v. Hintz, 800 F.2d at 828-829; Asarco Inc. v. EPA, 616 F.2d 1153, 1158-1160 (9th Cir. 1980). That record consists of the materials and files that were before the agency at the time the rule was promulgated or a decision was made, not materials adduced through de novo proceedings in court. See FPC v. Transcontinental Gas Pipe Line Corp., 423 U.S. 326, 331 (1976).

Insurance Co. v. FTC, 814 F.2d 731, 747 (D.C.Cir. 1987). Because plaintiff has not completed his appeal with the NTSB, this Court lacks jurisdiction.

2. There Is a Serious Question Whether Judicial Review, If Appropriate Now, Is Filed In The Appropriate Court

In lawsuits brought in this Circuit challenging the government's authority to suspend or revoke certificates for violations of safety regulations, the Ninth Circuit has accepted jurisdiction over such claims with the exception of two cases. For cases within proper court of appeals jurisdiction see Go Leasing v. National Transportation Safety Board, 800 F.2d 1514 (9th Cir. 1986); Roundtree v. United States, 40 F.3d 1036 (9th Cir. 1994); Clark v. Busey, 959 F.2d 808 (9th Cir. 1992); Komjathy v. National Transp. Safety Bd., 832 F.2d 1294 (D.C. Cir. 1987)(per curiam), cert. denied, 486 U.S. 1057 (1988); Green v. Brantley, 981 F.2d 514 (llth Cir 1993) and Gaunce v. DeVincentis, 708 F.2d 1290 (7th Cir.)(per curiam), cert. denied, 464 U.S. 978, 104 S.Ct. 417, 78 L.Ed.2d 354 (1983).

To date, the Ninth Circuit has allowed district court jurisdiction over Bivens[6] actions seeking monetary damages against individually named defendants when at least one of the claims is a broad constitutional challenge to the actions of the FAA, NTSB, and DOT. Mace v. Skinner, 34 F.3d 854, 858-60 (9th **[Page 11]** Cir. 1994)(lower court designation CIV 91-676(TUC)(RMB)(D. Ariz. 1992)) and Foster v. Skinner, 70 F.3d 1084, 1087-88 (9th Cir. 1995). In those cases, the Ninth Circuit articulated that it allowed this specific type of challenge to be handled in district court because the Federal Aviation Act, 49 U.S.C.§§ 40101-49105 (1995), provided no remedy for the Bivens claims seeking monetary damages. Mace at 858; Foster at 1088. In addition, the Court reasoned that the plaintiffs in

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6 Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics, 403 U.S. 388, 91 S.Ct. 1999, 29 L.Ed.2d 619 (1971).

those cases were able to avoid the exclusive jurisdiction of the Circuit Court by not basing their complaints on the merits of a particular order. Mace at 858; see Foster at 1087.[7]

Just recently, the Circuit Court further narrowed these parameters to allow the district court to have jurisdiction over Bivens actions only when the plaintiff's claims are not inescapably intertwined with the merits of a previous revocation order. See Tur v. FAA, 1997 WL 4758 at *2 (9th Cir. 1997); Mace at 858; Foster at 1087. In Tur, plaintiff sought recision of a settlement agreement he had entered into with the FAA after an **[Page 12]** ALJ found he had violated FARs and he sought monetary damages under Bivens from individuals he claimed deprived him of his property interest in his airman's certificate without due process of law through their use of false testimony in the administrative process. Tur at *1-2. In that case the Ninth Circuit held that the judicial review provision of the FA Act did not permit the district court to have jurisdiction because the claims were a collateral attack directed at the merits of a previous adjudication. Id. at *2 (citing Foster v. Skinner, at 1088 and Clark v. Busey, 959 F.2d 808, 811 (9th Cir. 1992); see Green v. Brantley, 981 F.2d 514 (llth Cir. 1993).

While plaintiff attempts to color his claims as a broad constitutional challenge to agency authority, examination of his prayer for relief reveals that his claim actually rests on statutory grounds and is intended to preclude agency determination on

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7 While Mace involved only a Bivens action, Foster included APA claims as in this case, in addition to Bivens claims. However, in Foster the Circuit Court took jurisdiction over all claims, characterizing the entire suit as a Bivens action. While the Court's distinction between which suits are to be properly brought in the Circuit Court and which are to be brought in district court is somewhat unclear after Foster, defendants assert that Mace and Foster should be interpreted as limiting the district court's jurisdiction to only those suits where there is a broad constitutional Bivens claim seeking monetary damages. In contrast, here the plaintiff is seeking injunctive and declaratory relief under the APA. However, it is overwhelmingly clear that no matter which court properly has jurisdiction, the defendants have the authority which plaintiff challenges.

the merits of the FA action. He is collaterally attacking the specific agency order against him. Plaintiff requests that this Court stop the current administrative proceedings against him and prevent the suspension order from going into effect. *See* Compl. Particularized challenges arising out of the facts of individual cases are precisely the type of claims barred from district court jurisdiction by operation of 49 U.S.C. § 46110. See Foster, 70 F.3d 1084; *Tur* at *3. Section 46110 of the FA Act does not permit collateral attacks on previous FAA adjudication to be brought in district court. See Tur at *3. See also Green v. Brantley, 981 F.2d at 521 (llth **[Page 13]** Cir. 1993); Clark v. Busey, 959 F.2d at 811 (9th Cir. 1992); United States v. McBride, 788 F.2d 1429, 1432 (10th Cir. 1986); Robinson v. Dow, 522 F.2d 855 (6th Cir. 1975); see generally Gaunce v. deVincentis, 708 F.2d 1290 (7th Cir. 1983)(for holding that the FA Act preempts federal question jurisdiction in the district courts).

The Ninth Circuit did not allow a plaintiff to challenge in district court an emergency suspension of his certificate when plaintiff sought injunctive relief alleging irreparable injury and denial of due process. Nevada Airlines v. Bond, 622 F.2d 1017, 1019 (9th Cir. 1980). The Court determined that by statute the it had jurisdiction over the petition for review of the emergency order, so it also had exclusive jurisdiction over the action for injunctive relief. Id. The Court reasoned that Congress could select the forum for judicial review of agency action and "special statutory review procedures take precedence over whatever non-statutory review might otherwise be available in the district court." Id. at 1020; see City of Rochester v. Bond, 603 F.2d 927, 935-39 (D.C.Cir. 1979).

Moreover, this Court should not depart from the dictates of the FA Act because the remedy plaintiff seeks is available to him under § 46110 of the Act, unlike the situation in Mace. § 46110 gives the court of appeals the jurisdiction to "to affirm, amend, modify, or set aside any part of the order and may order the Secretary or Administrator to conduct further proceedings." 49 U.S.C. § 46110(c). If plaintiff properly follows the

established **[Page 14]** administrative procedures under the FA Act, the court of appeals can review plaintiff's statutory and constitutional claims in addition to any other justiciable claims he may have to the final decision. Therefore it would appear that this Court does not properly have jurisdiction in this matter.

II. THE PLAINTIFF HAS FAILED TO STATE COGNIZABLE CLAIMS UPON WHICH RELIEF MAY BE GRANTED

In pursuing his claims under the APA, the plaintiff asserts that the FAA's use of certificate revocations and suspensions to penalize certificate holders for violations of safety regulations has never been authorized by law. Compl. at ¶¶ 20-21. He attempts to put this statutory claim into a constitutional context by asserting vagueness and that the suspension of his pilot's license as a penalty for air-safety violations exceeds statutory authority and therefore violates his Fifth Amendment right to due process. Id. at ¶ 22. Plaintiff similarly advances his Fifth Amendment claim on the theory that the agency's failure to publish its policy of suspending and revoking certificates deprived the plaintiff of adequate notice that his conduct could result in suspension of his certificate. Compl. at ,¶ 20-23. Plaintiff's claims are utterly without merit and completely ignore well-established law. These same claims were explicitly rejected by the Ninth Circuit when one of plaintiff's counsel (Mr. Smith) raised them in Go Leasing v. National Transportation Safety Bd., 800 F.2d 1514 (9th Cir. 1986) and in numerous other cases. This case also made clear that statutes are not unconstitutionally vague if they give fair warning of the **[Page 15]** proscribed conduct. Id. at 1525; Daily v. Bond, 623 F.2d 624, 626 (9th Cir. 1980).

A. The APA Standards for Judicial Review

As the FAA takes its enforcement actions based on its understanding that the FA Act gives it that authority, **plaintiff is in effect attacking the agency's interpretation of the FA Act. The interpretation of a statute by the agency charged with its administration generally is entitled to "great deference." Udall v. Tallman, 380 U.S. 1, 16, reh. den. 85 S.Ct. 1325 (1965). On

its face, the FA Act clearly gives authority to the FAA to take action to enforce the safety regulations. But even if the statute were silent or ambiguous, a reviewing court considers "whether the agency's answer is based on a permissible construction" of the statute according deference to the agency's interpretation. NLRB v. United Food and Commercial Workers Union Local 23, 48 U.S.112, 108 S.Ct. 413, 421 (1987) (quoting Chevron U.S.A. Inc. v. Natural Resources Defense Council. Inc., 467 U.S. 837, 843, n. 9 (1984)). To survive judicial scrutiny, the agency's interpretation "need not be the best or most natural one," so long as it is reasonable. Pauley v. Beth Energy Mines Inc., 111 S. Ct. 2524, 2537 (1991). Courts should not "lightly overturn" an agency's construction of a statute it is charged with administering and must accept the construction if it is reasonable. Dept. of the Treasury v. FLRA, 494 U.S. 922, 110 S.Ct. 1623, 1627 (1990). The Court must presume that Congress said what it means in a statute. Connecticut National Bank v. **[Page 16]** Germain, 503 U.S. 249, 253-54 (1992). Furthermore legislation carries with it a presumption of rationality and constitutionality. Walters v. NARS, 468 U.S. 1323, 1324 (1984); Hodel v. Indiana, 452 U.S. 314, 331-32 (1981).

In this case, controlling law in this jurisdiction and others clearly states that the FAA has the statutory and regulatory authority to suspend and revoke certificates in response to safety violations. See infra text. Because numerous courts have held that defendants have the authority to take such action, it goes without saying that these Courts have confirmed repeatedly that the agency's interpretation of the FA Act is reasonable.

B. The Ninth Circuit And Other Circuits Have Previously Rejected Substantially Identical Claims of Lack of Statutory Authority and Consequent Fifth Amendment Violations

Plaintiff appears to be oblivious to the fact that the courts of appeals for this and other circuits have consistently held that the FAA properly has the statutory authority to suspend or revoke

an aviation certificate as a sanction for violations of the Federal Aviation Regulations (FARs; that the NTSB is vested with the authority to uphold, amend, modify, or reverse orders of revocation or suspension; that the FA Act is constitutional; and that the FAA's procedure does not violate due process. See Go Leasing, Inc. v. National Transp. Safety Bd., 800 F.2d 1514, 1519-21, 1524, 1526 (9th Cir. 1986); Foster v. Skinner, 70 F.3d 1084 (9th Cir. 1995; Roundtree v. United States, 40 F.3d 1036 (9th Cir. 1994). See also Dilley v. National Transp. Safety Bd., **[Page 17]** 49 F.3d 667 (l0th Cir. 1995); Knipe v. Skinner, 999 F.2d 708 (2d Cir. 1993); Hite v. National Transp. Safety Bd., 991 F.2d 17 (1st Cir. 1993); Rochna v. National Transp. Safety Bd., 929 F.2d 13, 15 (1st Cir.), cert. denied, 112 S.Ct. 305 (1991); Hill v. National Transp. Safety Bd., 886 F.2d 1275, 1281 (l0th Cir. 1989); Tearney v. National Transp. Safety Bd., 868 F.2d 1451, 1454 (5th Cir.), cert. denied, 493 U.S. 937 (1989); Komjathy v. National Transp. Safety Bd., 832 F.2d 1294 (D.C. Cir. 1987)(per curiam)(APA and Due Process/Vagueness Claims), cert. denied, 486 U.S. 1057 (1988).[8]

In Go Leasing, the plaintiff made essentially the same APA challenge as in this case by arguing there was no grant of authority of the FAA and NTSB to impose revocations or suspensions for violations of safety regulations. Id. at 1526. In light of clearly established case law, plaintiff's claims that the suspension or revocation of an aviation certificate as a form of penalty for FAR violations has never been authorized by law and that the suspension of his pilot's license violated his Fifth Amendment right to due process are wholly without merit. Compl. ¶¶ 20-22.

C. 9th Circuit Law Also Rejects Plaintiff's Argument Regarding Notice and Comment

Plaintiff asserts in his complaint that because certificate

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8 One of plaintiff's counsel, Mr. Smith, is aware of these cases as he was a counsel of record on: Rochna, Tearney, Komjathy, Go-Leasing, Foster, Roundtree, Knipe, and Dilley.

owners are not advised by publication in the Code of Federal **[Page 18]** Regulations or any other "official federal publication" that a violation of the FARs could be sanctioned by revocation or suspension of their certificates or that the FAA has the authority to take such action, he was not afforded adequate notice under the Fifth Amendment right to due process. Compl at ¶ 23. He brings this constitutional claim under the APA. Compl. at ¶ 1.

Plaintiff continues to ignore the Ninth Circuit decision in Go Leasing, which held that the FAA's procedure for enforcing the FARs does not violate due process. Go Leasing, 800 F.2d at 1523-24. As has been firmly established in this and other circuits, the APA requires neither the promulgation through notice and comment nor the publication in the Code of Federal Regulations or the Federal Register of the FAA's policy to suspend or revoke certificates as a method of imposing sanctions for violations of FARs. See e.g:, Rochna, 929 F.2d at 15-16; Tearney, 868 F.2d at 1454; Komjathy, 832 F.2d at 1296-97; Go Leasing, 800 F.2d at 1522-24; Dilley, 49 F.3d 667 at 669-670. The standard by which the administrator determines whether suspension or revocation is appropriate is found in the Federal Aviation Act. Go Leasing, 800 F.2d at 1523; Reid v. Engen, 765 F.2d 1457, 1463 (9th Cir. 1985).

Specifically, 49 U.S.C. § 44709(b)(1)(A) authorizes the Administrator to suspend or revoke aviation certificates when he determines that "safety in air commerce or air transportation and the public interest" requires such action. That statutory **[Page 19]** standard is "synonymous with public safety." Holmes v. Helms, 705 F.2d 343, 345 (9th Cir. 1983)(per curiam). It is well-settled that the "public safety" standard articulated in 49 U.S.C. § 44709(b)(1)(A) is sufficiently definite to satisfy due process. See, e.g;, Tearney, 868 F.2d at 1455; Go Leasing, 800 F.2d at 1523; Reid v. Engen, 765 F.2d at 1463; Holmes, 705 F.2d at 345-46. Because the criteria under which the Administrator takes certificate action is provided in the Act itself and because such statutory criteria meet the notice requirement of due process, the publication of a statement

advising certificate holders that certificates are subject to revocation for FAR violations or of the FAA's authority to take such an action is not constitutionally required.

DEFENDANTS' OPPOSITION TO PLAINTIFF'S MOTION FOR PRELIMINARY INJUNCTION

Preliminary injunctive relief is not granted "except in the most extraordinary circumstances[.]" Rizzo v. Goode, 423 U.S. 362, 379 (1976). To qualify for a preliminary injunction in the Ninth Circuit, the moving party, has the substantial burden of showing either (1) a combination of probable success on the merits and the possibility of irreparable harm, or (2) that serious questions are raised and the balance of hardships tips sharply in the moving party's favor. Dumas v. Gommerman, 865 F.2d 1093, 1095 (9th Cir. 1989); Apple Computer Inc. v. Formula Int'l, Inc., 725 F.2d 521, 525 (9th Cir. 1984); see also Mayo v. United States Gov't Printing Off., 839 F. Supp. 697, 699 (N.D. **[Page 20]** Cal. 1992), aff'd, 9 F.3d 1450 (9th Cir. 1993). These standards are not two distinct tests but rather are the opposite ends of a single continuum in which the required showing of harm increases proportionately as the likelihood of success on the merits decreases, or vice versa. Rodeo Collection. Ltd. v. West Seventh, 812 F.2d 1215, 1217 (9th Cir. 1987). Nevertheless, under either formulation of the test, the moving party must demonstrate that it will be exposed to "some significant risk of irreparable injury." Associated Gen'l Contractors of Calif. v. Coalition for Econ. Equity, 950 F.2d 1401, 1410 (9th Cir. 1991), cert. denied, 503 U.S. 985 (1992). In appropriate cases, the public interest should also be considered. Lopez v. Heckler, 713 F.2d 1432, 1435 (9th Cir. 1983). Under these standards, plaintiff has not shown that he is entitled to a preliminary injunction.

I. Plaintiff Has Not Shown A Likelihood Of Success On The Merits Of The Case

As set forth above, plaintiff has failed to establish any bases in law for pressing his claim that the FAA and the NTSB do not have the authority to take suspension actions against him. Nor can he stop the administrative process by asserting frivolous

notice and comment/vagueness claims. Further, there is a serious question here whether there is any jurisdiction in this Court to hear this claim at this time. The cumulative effect of the case law is that plaintiff has no likelihood of success on the merits and, therefore, has failed to satisfy the first requirement for obtaining a preliminary injunction. **[Page 21]**

II. Plaintiff Has Not Demonstrated He Will Suffer Irreparable Harm Absent A Preliminary Injunction

Plaintiff has failed to establish a significant risk of irreparable injury, citing only inconvenience or unsupported, conclusory fears of loss of his job. These allegations are insufficient to support issuance of the extraordinary injunctive relief requested. First of all, plaintiff is still flying and is not on the verge of having his pilot's license actually suspended. See supra text. Plaintiff is in the midst of the administrative process, having appealed the proposed suspension of his pilot's certificate to the NTSB.

A preliminary injunction should not be issued because it would not change circumstances plaintiff states he seeks to avoid. In arguing that he will suffer irreparable harm, plaintiff merely opines that he would apply for a job with Delta Airlines if he were not involved in an FAA certificate action. Memorandum in Support of Motion for Preliminary Injunction, at 6. This does not establish irreparable injury. Nothing stops plaintiff from applying for any jobs. More importantly, a preliminary injunction will not erase the record of safety violations which gave rise to the FAA action, nor will it preclude the possibility that the suspension will ultimately be imposed. Plaintiff merely speculates about how he might lose his job at some point in the future.[9] Pure speculation of the type

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9 Nor do the burden and expense of complying with the administrative process constitute irreparable harm. It is well established that monetary injury, does not justify preliminary injunctive relief. "[H]owever substantial" the injury, the loss of money "falls far short of the type of

(continued...)

plaintiff provides is not enough to establish risk of irreparable harm. A party moving for an injunction is required to show that injury is "both certain and great." Wisconsin Gas Co. v. FERC, 758 F.2d 669, 674 (D.C.Cir. 1985)(bare allegations of what is likely to occur are of no value and mere injuries that are not irreparable are not enough).

III. Plaintiff Is Not Entitled To A Preliminary Injunction Because The Balance Of Harm Tips In Favor Of The Defendants And The Public Interest Would Be Served By Denying The Preliminary Injunction

The public interest argues against the injunction. The administrative procedure to revoke or suspend certificates acts to protect the public safety by preventing unsafe air personnel from engaging in their jobs for a period of time. It is in the public interest for the FAA to continue enforcing its regulations in a timely manner in order to encourage adherence on the part of all certificate holders. An injunction would frustrate the purpose of the Federal Aviation Act as mandated by Congress and would, therefore, disserve the public interest.

As this Court saw it proper to delay the hearing on the preliminary injunction for several months, it would not now be proper to implement such drastic measures when there are no extraordinary circumstances that call for injunctive relief.

CONCLUSION

For the foregoing reasons, plaintiff's motion for preliminary injunction should be denied; this case should be dismissed and the defendants awarded their cost of this litigation.

DATED this 13th day of February 1997.

Respectfully submitted,

FRANK W. HUNGER

Assistant Attorney General

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[9](...continued)

irreparable injury" necessary for preliminary relief. Sampson v. Murray, 415 U.S. 61, 90, 91-92 (1974); see Colorado River Indian Tribes v. Town of Parker, 776 F.2d 846, 850 (9th Cir. 1985); Los Angeles Memorial Coliseum Comm'n v. National Football League, 634 F.2d 1197, 1202 (9th Cir. 1980).

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s/ LUCINDA M. LOVE
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LAWRENCE B. SMITH
Attorney at Law

September 25, 1996

Hon. Richard M. Bilby
United States District Judge
55 East Broadway Blvd.
Tucson AZ 85701

Dear Judge Bilby:

I asked for an appointment earlier this summer in order to personally deliver the material contained in the accompanying file box. The 3-hole notebooks contain an official copy of a 461-page voluntary sworn statement of John E. Marsh, Jr. They are accompanied by an Exhibit Book used in taking the statement.

Marsh, without question is the expert's expert on FAA enforcement policies. He was the key deponent all three of the times I tried to set up depositions of several FAA lawyers.

Since nothing in the USC, CFR, nor any legislative history even hints at a connection between safety violations and suspension or revocation of an airman certificate (a fact which courts have consistently failed to acknowledge or deal with), I've known for years that the only way a litigant can show a court how the FAA program works is to get it out of the mouth of agency lawyers responsible for running it. Marsh's statement completely vindicates my claim that something is terribly wrong with that program. No reported case has ever been decided on the basis of a record that explains factually how the enforcement program works, much less their ramifications.

For two cogent reasons I urge you to read Marsh's statement. One, you have a picture of me as some kind of wildman chasing wayout theories about FAA enforcement. Two, the integrity of the judicial process has been tampered with by both Justice and FAA lawyers. And I can easily explain how they've done it.

(1) Harassment —In *Mace v. Skinner*, CIV 91--676 TUC RMB, you charged that I came close to harassing the government; you also ordered the Clerk not to accept anymore pleadings from me on the subject. These are extremely serious matters, obviously leading to your statement you'd not be comfortable talking to me.

When you read Marsh's explanation of how FAA enforcement works, I'm certain you'll see that Justice Department counsel's persistent claim that I've been harassing the government is totally false and was designed to mislead.

May I suggest you first read the Executive Summary. It outlines some of the more important facts brought out in the statement. The "Significance" paper expands on that. I hope you will read the entire statement. It's a little ragged: Marsh wanted to talk, so I let him; I couldn't really cross-examine him or press too hard. He was obviously uncomfortable and I couldn't risk his walking out. Besides, I like the man, and it took lots of guts on his part to participate. He was paid $500 for his time. I knew him when I worked at the FAA in 1967-68.

The statement took eight hours of intensive questioning. (I

could have used another day.) I think he agreed to do it because I'd had him read my law review article and he wanted to justify his twenty-one years in enforcement. I'm sure he was unaware during that time of the history my article lays out, history that shows the illegality of the FAA license penalties beyond purview.

(2) Integrity of the judicial process — Let me refresh your memory. The *Mace* record will reflect that while the case was in the Ninth Circuit you granted my motion under Fed.R.Civ.P. 27(b) (perpetuation of testimony by deposition while a case is on appeal) to depose Marsh and several others, all over 70. Justice Department Counsel, Nina Pelletier, then called me on a Thursday night from Chicago and left a message on my answer machine: "We are not going to oppose the depositions (it was an appealable order), and I'll be back in Washington on Monday."

Monday morning, I set up times with two of the most important deponents: Marsh, and Nathaniel Goodrich, FAA deputy general counsel and general counsel from January 1959 until 1970. Pelletier, that same morning, agreed to the times.

Then, that afternoon, she talked with the FAA litigation lawyer with whom she coordinated. Evidently she hadn't told him about the depositions. It was clear from what followed that the FAA lawyer went into a panic mode. He cited a DOT rule that prevented agency employees from testifying as experts. It had been recently amended to include *former* employees. It had no application to my witnesses: they were simply going to testify, as Marsh has done, factually as to how the enforcement system works, not as experts giving an opinion, such as, on the cause of an aircraft accident.

The whole situation flip-flopped. Pelletier told me that same afternoon she was going to file an emergency protective order. She did. The use of the DOT amended rule (self-described as a "housekeeping" rule) was nonsense. The authorities are clear, as are basic legal principles: agency rules cannot impinge upon judicial authority. But the main thrust of what she did over the phone during the hearing was spout the usual rhetoric about my

harassing the government because of the cases I'd filed. You granted the motion.

In none of the cases I filed did Justice Department counsel ever deal directly with any of the separate and carefully worded causes of action; *e.g.*, they never once explained how the government can run an important system of administrative justice but not warn airmen in any official federal publication that their licenses are at risk for the violation of a safety rule.

No reported case has ever ruled on any of the many causes of action I asserted on behalf of my clients. Two exceptions, both directly support two of the causes of action. With all due respect your Honor, the irony in all this is something you said to Monte Clausen back in 1990 in *Clark v. Busey*, CIV 90 164 TUC RMB. The complaint sought a mandatory injunction that would require the FAA to publish in the Federal Register a summary I'd prepared for airmen who had petitioned for a comprehensive rule that explained FAA enforcement. You had granted my motion to accelerate depositions. Clausen, on behalf of the FAA, orally moved for a protective order.

You denied it, and told him, "He's going to get his depositions anyway." A few days later FAA lawyer Peter Lynch arranged a telephone conference with you in Philadelphia; the FAA capitulated, so you canceled the depositions. Your statement was my guiding light throughout the *Bivens* and FTCA lawsuits I filed.

I've known since 1980, when I was a consultant to the U.S. General Accounting Office, and interviewed major players in the FAA enforcement program, that if ever put under deposition where they had no choice but to explain how it worked it would collapse from the weight of the simple truth. That is the great contribution Marsh has made.

After you read this material, all or part, I would be most grateful for a chance to sit down with you informally, answer any questions you might have so that this cloud over me can be blown away. I also want to explore any appropriate action that could or should be taken. You are welcome to keep any of the material as long as you wish.

Respectfully,
Lawrence B. Smith

Encls

Wall Street Journal Op-Ed column
Marsh: Executive Summary
Marsh: "Significance" White Paper
Marsh: Court Reporter copy of statement (2 volumes)
Marsh: Copy of Exhibit Book used for statement
Marsh: Floppy disk with statement in ASCII and WPWin 6.0*
F.K. Smith letter
Paul McAfee letter

* This file contains Marsh's ~~deletions~~ and additions

EXHIBITS TO ACCOMPANY
JOHN E. MARSH JR. STATEMENT

Major Categories

I. AVIATION STATUTES
II. LEGISLATIVE HISTORY
III. ADMIN. PROC. ACT
IV. FARS (CFR)
V. OLD CAA/FAA RULES
VI. NTSB RULES
VII. ENFORCEMENT MANUALS
VIII. FAA ORDERS
IX. KEY FAA DOCUMENTS
X. KEY CASES
XI. *WILSON* GOVT. BRIEF
XII. MISCELLANEOUS
XIII. FEDERAL REGISTER EXCERPTS

Tab No. I. AVIATION STATUTES

1. Air Commerce Act of 1926

a. § 3(f) (44 Stat. 568, 570)
b. § 11 (b) (44 Stat. 574)

2. Civil Aeronautics Act of 1938
   a. § 609 (52 Stat. 1011)
   b. §§ 901, 903 (52 Stat. 1015,1017)
3. Federal Aviation Act of 1958
   a. § 602 (72 Stat. 776)
   b. § 609 (72 Stat. 779)
   c. §§ 901 & 903 (72 Stat. 783)
   d. § 609, were it amended

II. LEGISLATIVE HISTORY

4. 1926 & 1958
   a. 1926: Enforcement by means of civil penalties
   b. 1958: Senator Monroney

III. ADMINISTRATIVE PROCEDURE ACT

5. 5 U.S.C. §§ 551, 552, 553, 558

IV. FARS (CFR)

6. 14 CFR pt 13 (1968): §§ 13.11, 13.15, 13.17, 13.19, 13.67

V. OLD CAA/FAA RULES

7. § 74 (1926) and civil penalty rules
8. 1938 CFR
   a. 14 CFR 20.37, 20.37110, etc. (1938)
   b. Part 94 "Penalties"
9. 14 CFR 408.25 8 25 (1952)(emergency rule)
10. 14 CFR 408.23 (1960) (civ pen rule--"shall be subject to")
11. 14 CFR 408.23 (1962) § 13.15 (1964) ("is subject to")
12. 14 CFR 301.23 & 26 (1956 - CAB) (Record of prev viol)

VI. NTSB RULES

13. 49 CFR § 821.30 et seq. (1977)

VII. MANUALS

14. CAA Man of Proc 103, ("Blackjacking")
15. FAA Manual of Procedures, Ch. 22, (1960)
16. FAA Order 8030.7A 1970, (Reinsp/Reexam vs. "punishment")
17. FAA Order 2150.2 (1968)
    a. Cover/p.3: Enforcement, statutory responsibility
    b. p. 4: Legal processing by counsel
    c. p. 9: Do not use both actions; how to choose which
    d. p. 10: Revocation/concurrent imposition of sanctions
    e. p. 13: Prior violation record
    f. p. 15: If viol too old use civil penalties
    g. p. 27-28: Multiple actions, don't do, but not against law
    h. p. 39-40: Emergency, never impose for punitive reasons
    i. p. 57: compliance disposition
    j. p. 99-100: care, judgment & responsibility
18. FAA Order 2150.3 (1980)
    a. Cover
    b. Foreword
    c. p. 11: Must estab regulatory standards
    d. p. 12: Statutory background
    e. p. 13: Impose punitive sanctions achieve remedial purposes
    f. p.14-16: Determine type of legal action
    g. p. 17-18: Selecting the sanction
    h. p. 19: First offense violations
    i. p. 44-45: Ltrs of investigation

("don't cite FAR")

j. p. 65: Sample LOI ("discuss it with us")

k. p. 101-02: Reinspection-reexamination

l. p. 162-63,166: Civil penalties; shift in sanctions

m. p. 167-68: Certificate Action (deferred action)

n. p. 173: Emergency orders (lack of qualifications)

VIII. MISC. FAA ORDERS

19. FAA Order 1000.9C, Enf. Policy (1967) (See other list)
20. FAA Order 2100.13, ¶ 22a at 8 & ¶ 33.B, at 14

IX. GAO MATERIAL

21. James Minor memorandum re Admin. Proc. Act
22. Daggett Howard memo
23. Carneal memo
24. Letter regarding problems with civpens
    a. Baker letter
    b. Coker letter
25. Survey of the enf program (Keyser)
26. Briefing for Anderson Subcom

X. REPORTED CASES

27. *Wilson v. CAB*
28. *Hard v. CAB*
29. *Pangburn v. CAB*
30. *Petition of Sichel*

XI. BRIEFS

31. *Wilson v. CAB*, Brief for the Respondent (Govt.)
    a. pp. 20,21,22
    b. pp. 11-19

c. pp. 74-74

d. p. 7 (Bd's purpose is remedial)

32. *Lee v. CAB* ("remedial" challenged by CAB itself)

XII. MISCELLANEOUS

33. Komons, *Bonfires to Beacons*
34. Jennings Roberts memo
35. Nadiak cases re air safety
36. Petition for Rulemaking FAR 13.19

XIII. FEDERAL REGISTER

37. 24 FR 8 (1959) (rulemaking: "will follow APA")
38. 27 FR 1110 (1962) (establishes FAA hearing program w/o NPRM)
39. 35 FR 5464 (1970) (eliminates FAA hearings w/NPRM)

FAA ENFORCEMENT RELATED ARTICLES
BY LAWRENCE B. SMITH

1. *SMITH, FAA PUNITIVE CERTIFICATE SANCTIONS: THE EMPEROR WEARS NO CLOTHES;. OR, HOW DO YOU PUNISH A PROPELLER?*, 14 Transp. L.J. 59-100 (1985) ("*Emperor*").
2. "FAA BLACKJACK," *Professional Pilot* at 91, Feb. 1981.
3. "FAA: ILLEGAL DISCIPLINARIAN?," *Aviation Digest* at 26, Sep. 1987.
4. "FAA ABUSE OF POWER: A CASE STUDY; THE GO GROUP UNLIMITED, TUCSON, ARIZONA, MAY 1988" (booklet published privately).
5. "FAA ENFORCEMENT: TIME FOR REFORM," *FBO Magazine* [Fixed Base Operator] at 50, Sept-Oct 1989.
6. "ARE BASIC FAA PROCEDURES LEGAL?," Western Flyer at 8 Sec. A, 2nd Issue Oct. 1989.
7. "CAN THE FAA TAKE YOUR TICKET?," *The Southern Aviator* at 22, Sep. 1994 (also published in two other

aviation journals).

8. "REGULATORY COMMISSION WOULD REIGN IN UNELECTED BUREAUCRATS," *General Aviation News & Flyer* at 15, 1st Issue Jun. 1995.
9. "OPINION FROM A MEMBER," *Lawyer-Pilots Bar Ass'n Journal* at 6, Summer 1995 (same article as preceding; also published in three other aviation journals).
10. "WHY DID FAA WAIT SO LONG TO ADMIT REVOCATION CASE WAS FULL OF HOLES?," *Flyer* at 33, Oct. 16, 1998.
11. "FAA DROPS REPO MAN CASE AT LAST MINUTE," *Atlantic Flyer* at 10, Oct. 1998 (same article as preceding).

FAA ENFORCEMENT CASES TRIED BY LAWRENCE B. SMITH

12. Go Leasing (assisted — emergency revocation) ..... Tucson, 1 week
13. Royal American Airways (emergency revocation) ..... L.A., 1 week
14. Crete (operator, emergency revocation) ..... Boston, 2-3 days
15. Rochna (airman, suspension) ..... Boston, 1-2 days
16. Hite (airman, revocation, non-emergency) ..... Boston, 2 days
17. Alaska Island Air (emergency revocation) ..... Juneau, 2-1/2 days
18. Coastal Airways (emergency revocation) ..... Seattle, 2-1/2 weeks
19. Air San Juan/Chart Air (emergency revocation) ..... Seattle, 1 week
20. Post (airman, civil penalty)..... Seattle, 1 long day
21. Peddicord (airman, revocation) ..... Phoenix, 1 day
22. Baldwin (airman, emer/revo, settled start of trial) ..... Juneau

FAMILIAR WITH:

23. McGee (airman, emerg/revo., handled appeal).
24. Tearney SW Airlines Capt., emer/revo (handled appeal of later suspension).

25. Butler (airman, emergency revocation).
26. Active Aero Charter (airmen, emergency revocations).
27. Rocky Mountain Helicopters (threatened emergency revocation).
28. Mall Airways (threatened emergemcy revocation).
29. Houston Helicopters (emergency revocation).
30. TPI Int'l (emergency revocation).
31. Airmark, Inc. (emergency revocation).
32. Connor Airline (emergency suspension).
33. Connor Airline (emergency revocation).
34. U.S. Jet (emergency revocation).
35. Bouch (airman, emergency revocation).
36. Bouchard (airman, emergency revocation).
37. Mace (airman, emergency revocation).
38. McKinley (airman, emergency revocation).
39. Smith (Alaska bush pilot, 1966, emergency revocation).
40. Melhus (ATP, 1967, emergency revocation).
41. Saltz (ATP, 1996, emergency revocation, Alaska).
42. MarkAir (1995, emergency revocation, 1600 people lost their jobs; six days after the order was issued it was withdrawn, but company was destroyed).
43. Larry Rivers (Private pilot, emergency revocation Alaska hunting guide for 20 years).
44. Viscount Air Service, Inc. (threat of emergency order used to extract stiff civil penalty)

UNITED STATES GOVERNMENT
MEMORANDUM

FEDERAL AVIATION AGENCY
November 9, 1967

SUBJECT: Case analyses

FROM: Acting Associate General Counscl,
Operations and Evaluation Division

TO: General Attorney, Lawrence Smith
Through: Chief, Policy and Eval. Branch, GC-31

Through: Chief, Policy and Evaluation Branch, GC-31

I have read with interest your analyses and comments of October 24, 1967, on several Air Carrier and General Aviation Enforcement Cases. I found your views and comments refreshing and you pointed out some areas that I tend to overlook in my day-to-day routine.

I noted that you were particularly concerned about inconsistencies in sanctions between regions, and even in the same regions, for similar violations; and also, the degree of the sanction relative to the type of violation. This has long been a concern. It must be realized, however, that each case involves different personalities and different facts, which, of course, will influence the sanction decision.

It is settled policy and procedure that Counsels consult with and coordinate proposed sanctions with Flight Standards personnel and this coordination also affects the ultimate sanction imposed by the agency.

With specific reference to your comment on the Donald O. Cunningham case, I think we might have a constructive discussion at our next staff meeting (coffee or otherwise) concerning the question of the responsibilities of a co-pilot under our regulations to take affirmative action in a situation similar to the one in that case.

The George Roots case raises several interesting questions for discussion: the adequacy of the civil penalty; when should a company be responsible; and what about the mechanic that actually did the work?

Based on your short summary statement of the facts, I agree that in the Lake Central Airlines, Inc. case, we perhaps should obtain some explanations of the $250 amount of civil penalty accepted. I suggest that Mr. Plummer might want to make a decision on this.

s/Jennings N. Roberts, GC-30

[Note: I started to work at the FAA on Oct.21, 1967 — lbs]

THE WASHINGTON MONTHLY
1180 CONNECTICUT AVENUE, N.W. SUTIE 84
WASHINGTON, D.C. 20036

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202-659-4866

February 16, 1970

Mr. Lawrence B. Smith
117 E Street S.E. - #B
Washington, D.C. 20003

Dear Larry:

After a good deal of reflection, I find myself convinced that you have the makings of a damn good book, but I don't see an article for us. The problem is that a convincing compilation of the cases from your manuscript would take more space that I can justify giving to this subject.

I hope you don't mind dropping by to pickup the material, since it's somewhat cumbersome to try to mail.

And thanks for letting me read and think about it.

Sincerely,
s/Charlie
Charles Peters
Editor

FUND FOR INVESTIGATIVE JOURNALISM
2935 ORDWAY STREET, N.W.
WASHINGTON, D.C. 20008

—

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Mr. Lawrence B. Smith
117 E Street, S.E.
Washington, D.C. 20003

Dear Larry:

After reading the portions of your book, I am filled with both admiration and regret. Admiration, because of the absorbing manner in which you expose a great federal bureaucracy trampling with incompetent feet upon the interests and rights of ordinary citizens; exposures of this kind seem the most important work of journalism in this era. Regret, because the groundrules under which we operate permit research grants only for magazine articles, not books. I ardently hope you obtain either foundation assistance or an adequate advance from a publishing house to enable you to finish this important book. If the time comes when you can consider a magazine article on the subject, please let me know, for both your story and your ability in telling it make an excellent prospect for us.

Please keep me informed of your progress.

With best wishes,

Sincerely yours,

s/James Boyd

Thursday, Feb. 19, 1970 – THE WASHINGTON POST F10

Classified Handbooks Released by FAA

The Federal Aviation Administration, under threat of a Freedom of Information Act suit recently filed in U.S. District Court here by Lawrence B. Smith, an attorney and former FAA employee who is writing a book about its regulatory enforcement systems, has released copies of two agency

handbooks to Smith that govern and explain FAA handling of its enforcement cases. The handbooks had been classified and kept from the public.

Smith says they should have been made available to the public back in 1967 when the Freedom of Information Act took effect. More than 800,000 people who hold FAA issued licenses can now find out authoritatively, when charged with a rules violation, how the system works, Smith said.

AIR TRANSPORT ASSOCIATION [ATA] OF AMERICA

1709 New Yorh Avenue, N.W.
Washington, D. C. 20006
Phone (202) 872~0000

CLIFTON VON KAHN
Senior Vice President
Operations and Airports

November 16, 1979

Mr. Lawrence B. Smith
P. O. Box 88
Laurel, Maryland 20810

Dear Mr. Smith:

I am returning the book chapters which you left with me, having read them with great interest. Also I called John Casey as promised and he will see that your letter and the material you sent him receives careful thought.

As for my reaction, I liked what I read and my emotional reaction is that I'd like to see it published. On the more objective side, I'm not really sure that it would change things much since books about FAA, no matter how shocking, almost never bring about change. The surest road to reform is to hire an Administrator and General Counsel who want to change things.

As for the possibility of financial support from ATA, this is something we've never done in the past; and from my informal talks with our front office it's clear that we're not about to modify this policy. Sorry.

I appreciate your contacting me and will be interested in

your progress.

Sincerely,
s/Clifton F. von Kahn

Enclosure
a/s

[Note: This was the same material viewed by James Boyd and Charles Peters.]

UNITED STATES GENERAL ACCOUNTING OFFICE
WASHINGTON, D.C. 20548

COMMUNITY AND ECONOMIC DEVELOPMENT DIVISION

JUN 6 1980

Mr. Clark Onstad
Chief Counsel
Federal Aviation Administration
Washington, D.C.

Dear Mr. Onstad:

As an aid to the study we are conducting of FAA enforcement, early this year we hired Lawrence Smith as a consultant to do a legal/practical analysis of that system. We are now at a point with his review where it would be helpful to talk to you and key members of your staff connected with enforcement. We have in mind Messrs. Faberman, Marsh, and Cassady. We'd like to meet the last week of this month.

Mr. Smith has raised fundamental questions about the Agency's statutory authority for the certificate portion of its enforcement program, the manner in which it is conducted, and whether the Agency is following the mandates of the Administrative Procedure Act. So if your schedule does not permit you to meet with us, perhaps we can count on Mr. Howe. For your information enclosed is a list, prepared by Mr. Smith, of the major

topics and questions we would like to discuss.

Present at the meeting, besides Mr. Smith, will be Gregg Fisher of my staff and Geraldine Rubar of the GAO's Office of General Counsel. We will call your office to firm up a date and time.

Sincerely yours,

s/Thomas D. Reese
Group Director
Enclosure

UNITED STATES G0VERNMENT
GENERAL ACCOUNTING OFFICE
MEMORANDUM

TO : Thomas D. Reese, Group Director, CED/AVIA

FROM Lawrence B. Smith, Legal consultant

SUBJECT: Proposed meeting with FAA Chief Counsel

In any meeting with Mr. Onstad and his staff regarding FAA enforcement. I suggest we cover the following topics and questions:

1. Why does the FAA not provide a booklet to airmen that explains in layman language how the enforcement system works?

2. How the system works, giving particular attention to the dichotomy inherent in the use of Sec. 609, qualifications/punishment; discretion in selecting both the type and amount of punishment; discretion in switching from one type of sanction to another. (In 1951, CAA General Counsel R.E. Elwell ordered that switching from a certificate action to a civil

penalty be done only in "unusual circumstances" after a "complete report of the facts" to and approval by Washington because of "unfavorable public reaction" and "the withdrawal of one remedy to pursue another is criticized as 'black jacking'" A survey of the public docket indicates switching is the rule now rather than the exception. Why is it any less "blackjacking" today than 30 years ago? Manual of Procedure, p.65, 1951.)

3. The roadblock that U.S. Attorneys seem to create for civil penalties and what might be done about it.

4. Is there a legal reason why the agency cannot put a civil penalty on an airman's recorf for future consideration?

5. Is there a legal reason why the agency cannot direct an airman to undertake specific training in lieu of being retested or reexamined?

6. What are the legal/policy reasons against using a system of citations and fixed money penalties (which could immediately be paid like forfeiture of collateral) against individual airmen?

7. How will the new laundry list solve the chronic and perpetual problem of lack of uniformity in sanctions?

[Page 2] 8. What are the policy reasons for appeallag those cases where the Admin. Law Judge finds a violation but reduces the sanction?

9. What prevents the agency from setting penalties on the high side in order to leave room for compromise?

10. The agency is openly critical of NTSB ALJ's for reducing penalties, but what does the agency do to apprise the Board of the penalties it metes out and which are not appealed?

11. Is there any information system on this between regions?

* * *

12. What is the FAA's statutory basis for suspending or revoking an airman's certificate as punishment for violation of a safety regulation?

13. Put it another way: If one were to give a copy of the FAA Act of '58 to a class of first year law students and ask, what would they reply is the method Congress prescribed for punishing airmen who violate safety regulations?

14. The counterpart question is: What language in either the Act or the Federal Aviation Regulations tells the airman his license is at risk for a violation of a regulation?

15. Sec. 901 commands in razor sharp language that "Any person who violates a safety regulation shall be subject to a civil penalty." Note, this does not say "some" persons, it does not say "might be," "may be," or "can be" subject to a civil penalty, yet this is precisely the way the agency interprets that section. Why?

16. Sec. 903 provides that the airman, if he wants a trial of the violation charges against him, may "demand trial by jury of any issue of fact." It is entirely within the discretion of FAA regional counsel, subject only to general guidelines and coordination with Flight Standards, to choose whether to send a violation case down the certificate track of administrative justice with a Notice of Proposed Certificate Action, or to send it down the 901-903 civil penalty track of judicial justice with a civil penalty letter. So when the FAA lawyer sends the case down the certificate track the practical effect of that decision is to deny the airman the opportunity of ever "demanding" a jury trial. Is this, or is it not, a correct interpretation of the facts?

[Page 3] 17. Counterpart question: Why would the

Congress of the United States, in clear language, language of the Seventh Amendment, set up a penalty system for violations of safety regulations, provide that the accused have the right to demand a jury trial, then turn right around and grant power to an official of the executive branch to deny that man the opportunity to ever exercise that right? To my knowledge the FAA has never had to answer this linchpin question in court, before Congress, or any public forum. We should have an answer.

* * *

The Administrative Procedure Act requires that each agency publish in the Federal Register, rules of procedure, substantive rules of general applicability, statements of general policy or interpretations of general applicability. If the matter is substantive it should be adopted as a rule in accordance with formal procedures. FAA ORDER 2100.13, FAA RULEMAKING POLICIES, Sec.33.b.3., provides:

> The Office of the Chief Counsel is responsible for: . . . Reviewing internal directives and advisory circulars to assure they are neither used for nor have the effect of regulations and are consistent with the regulations.

So the questions as to each of the following is: Why is the matter or procedure not substantive (and therefore not required to be made into a rule)? And, if not a rule, why should it not be published in the Federal Register as a statement of general policy or interpretation of general applicability?

18. The FAA has no rule that tells an airman he can have a certificate suspended or revoked because of a violation of the FAR's, yet this is the greater part of the enforcement program.

19. In setting the size of a penalty for an offense the FAA lawyer will consider prior violations and possibly increase it over what it otherwise would have been; he will seek revocation, in his judgment, if the airman, because of his violation

history, shows he lacks a "compliance disposition" and therefore the qualifications to hold his certificate. This is an ad hoc point system. There is no rule on what a compliance disposition is nor one that warns an airman that prior violations can be used against him. At one time the FAA started a project to write a rule about a compliance disposition but dropped it.

20. The FAA will order revocation as punishment for "serious" violations yet NTSB policy is that the Board will revoke only for a lack of qualifications. Since the Board itself has published no rule on this, but relies only on case precedent, the airman is left in the dark and

[Page 4] caught in the middle. Surely on something as fundamental as this he should be told in a rule what his risks and rights are? (Interestingly, he is, in 61.15/91.12 and 67.20. Which raises the question: If the FAA can spell it out in these somewhat obscure rules, why not in Part 13? And under the exclusionary rule of logic, if the agency has taken the trouble to spell it out in these regulations, it can be fairly inferred that such a punishment does not apply to other regulations, especially in the absence of any regulation that says so.)

21. The FAA has no rules for the use of its emergency power, yet the lawyers' handbook lays out criteria and standards for it use, admonishes that it not be used for punitive purposes, meaning that perhaps it has and certainly could well be. Why should these matters not be in rules so that the public can protect itself from possible abuse?

22. Since the agency exercises complete discretion over which track, administrative/certificate, judicial/civil penalty, it will place an enforcement action on, why is the public not entitled to know that such discretion exists, what the standards are for selection, and why one man is punished with a civil penalty, the other with a certificate action?

23. The FAA lawyer has discretion to switch from one form of sanction to the other, yet the public is not told this option exists nor what the standards are for doing it. Why not?

24. The FAA says a civil penalty and certificate action will normally not be imposed for the same violation? Why is this not a rule? What is the statutory authority for imposing both?

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BARRY M. GOLDWATER, JR.
20TH DISTRICT OF CALIFORNIA

COMMITTEE OF PUBLIC WORKS
AND TRANSPORTATION
COMMITTEE ON SCIENCE AND
TECHNILOGY

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CONGRESS OF THE UNITED STATES
HOUSE OF REPRESENTATIVES
WASHINGTON, D.C. 20515
July 2, 1980

Honorable Gene Snyder
Ranking Minority Member
Aviation Subcommittee
Public Works Committee
Room 2330 RHOB
Washington, D.C. 20515

Dear Gene:

I received the enclosed draft position paper on H.R. 7488 from Lawrence Smith, a very competent lawyer who specializes in FAA enforcement.

The memo contains several good ideas which might be useful if the bill goes any further.

As I said at the hearing, FAA needs larger penalties for the few flagrant violations which really endanger lives. However, I think current penalties are sufficient for the vast majority

of violations, which are fairly minor in nature.

With best wishes,

s/BARRY M. GOLDWATER, JR.
Member of Congress

BMG:Tbw
Enclosure
cc: Hon. Glenn Anderson
Chairman
Aviation Subcommittee
Public Works Committee
David Heymsfeld
Richard Kowalewski
David Traynham
Marshall Filler
Ron Gering

FRANK KINGSTON SMITH

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AREA CODE: 609
399-0662

28 June 1983

Lawrence B. Smith
Post Office Box 88
Laurel, Maryland
20707

Dear Larry:

I have read the material you sent me from end to end, including the additional stuff you sent me which was already in the package of xeroxed papers. I have also run through my old "bible" (Aeronautical Statutes and Related Material) and the applicable regulations and am absolutely convinced that you are eminently correct in your assertions about the state of the law and procedural regulations. I have also spoken to Mr. Moody who reiterated your remarks and feels that you have solid legal grounds.

However, I cannot report any interest from any publisher

or independent publishing specialist to produce a book, on the basis that there seems to be no profitable market for such a publication; their concern is the limited audience of purchasers for such a narrow legal theme. As one who has labored long and bleedingly over book manuscripts and had them published only to find that they did not ruffle the waters of the book world, I can understand their reluctance to invest their own capital into such an endeavor.

I believe that this entire legal mess should be placed in the hands of a prestigious law school's law review, or, in the alternative, in the Journal of the Lawyer-Pilots Bar Association. Of course, it would have to be appreciably shortened to produce the quintessence of the argument, with footnoted citations and references. John Yodice is one of the moving parties of the Lawyer-Pilots Bar Association.

What is going to blow this wide open is a good case brought against a prominent, wealthy aviator to whom the amount of a fee is immaterial, especially if the case starts with an Emergency Revocation. One of these days, it is going to happen. Until then, there a[re] few sources for funding to pursue the issue to a successful conclusion.

Hell of a note. I bleed for you.

Sincerely,
s/Frank

[Note: Now in his early 80s, in the 1950s Smith was a Philadelphia trial lawyer. To reduce stress he learned to fly, then quickly wrote a best seller about that pleasure, *Weekend Pilot*. That made him something of a icon in General Aviation and much sought after speaker. Thereafter for ten years he headed a major aviation trade association, practiced before the CAB, and on retirement was hired by the Piper Aircraft Corporation to be its ambassador of good will.]

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June 20, 1990

Honorable Tim Valentine
Member of Congress
1510 Longworth
House Office Building
Washington, D.C., 20515

Dear Congressman Valentine:

I have just reviewed the bill drafting project of Lawrence B. Smith proposing a bill to create a comprehensive program of justice for the enforcement of Federal Aviation Administration Safety Regulations.

I understand that one of your aides is presently tasked with drafting a bill in the same general subject area.

I wanted to take this opportunity to commend Mr. Smith's proposal for consideration as a nucleus for that bill.

I have represented thousands of aviation businesses and individual pilot and aircraft mechanics in air safety regulatory matters over the course of almost 20 years and am intimately familiar with the strengths and weaknesses of the present system. From that perspective, I can tell you that Mr. Smith knows what he is talking about and has obviously put profound thought and effort into his draft of a proposed bill to build on the strengths of the program and eliminate its weaknesses. His proposal strikes a proper balance between protecting the rights of commercial aviation enterprises and individuals engaged in aviation pursuits to fair treatment while strengthening the public's assurance of continuous, timely and detailed FAA scrutiny of commercial air carrier

compliance with rules governing their operation and maintenance.

This is an outstanding draft bill and I commend it most highly to your consideration, Congressman Valentine.

If I may be of any assistance to you or your staff in this subject area, please feel welcome to call or write me at any time.

Very truly yours,
s/ J. Scott Hamilton

JSH.neah

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